
U.S. Department of Labor

Office of Administrative Law Judges
800 K St., NW Suite 400 N
Washington, DC 20001



DATE: July 13, 2000
CASE NO.: 2000-ERA-4

In the Matter of

ROBERT E. NIEDZIELSKI
Complainant

v.

BALTIMORE GAS & ELECTRIC COMPANY
Respondent

Appearances: Mr. George E. Golomb, Attorney
For the Complainant

Mr. Mark T. Hackman, Attorney
For the Respondent

Before: Richard T. Stansell-Gamm
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended ("ERA" and "Act"), Section 211, 42 U.S.C. 5851 as implemented by 29 C.F.R. Part 24 (effective date - March 11, 1998; see 63 Federal Register 6614, February 9, 1998). This statutory provision prohibits an employer from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee engaged in activities to carry out the purposes of the statute. The complainant, Mr. Robert E. Niedzielski, has filed a complaint alleging diverse acts of adverse actions by the respondent, Baltimore Gas & Electric Company ("BG&E") in retaliation for his alleged protected activity under the ERA statute. The proceeding in this case was conducted in accordance with the provisions of 29 C.F.R. Part 24.

Procedural Background

On August 27, 1999, Mr. Robert Niedzielski, through his counsel, Mr. George Golomb, filed a discrimination complaint with the Occupational Safety and Health Administration, U.S. Department of Labor ("OSHA"). Mr. Niedzielski alleged his employer, BG&E had discriminated against him because: a) he complained to his supervisors that BG&E did not assign sufficient personnel to create a Nuclear Regulatory Commission ("NRC") license operator examination; and, b) he expressed nuclear safety concerns regarding the test. The adverse actions included an adverse job appraisal, a salary reduction, and a pay reclassification. On November 17, 1999, OSHA informed Mr. Niedzielski that it could not substantiate his discrimination complaint because BG&E established a legitimate reason for the adverse actions and Mr. Niedzielski was unable to link his protected activity with the adverse action. In response, Mr. Niedzielski on November 26, 1999 requested a hearing with the Office of Administrative Law Judges.

Pursuant to a Notice of Hearing, dated December 3, 1999, I set a hearing date of December 20, 1999 in Washington, D.C. (ALJ 1).¹ A few days later, based on a joint request, I continued the hearing until January 25, 2000 (ALJ 2). Although I attempted to conduct a hearing on January 25, 2000, adverse weather prevented the attendance of all the parties. As a result, I again continued the hearing until February 8, 2000 (ALJ 3). On February 8 and 9, 2000, I conducted the hearing. Mr. Niedzielski, Mr. Golomb, and Mr. Mark T. Hackman were present.

Complainant's Statement of the Case²

The individuals entrusted to run nuclear power plants must pass a three part examination (written test, simulator scenario, and plant operations evaluation) that, in part, addresses nuclear safety. Considering the extensive nature of the operator's examination, its preparation is "an enormous undertaking." Mr. Niedzielski was responsible for developing the examination for BG&E. He accomplished the work to the best of his ability but he needed more resources to properly complete the task. Mr. Niedzielski made repeated efforts to obtain additional resources from his supervisors. Following his complaints about lack of resources and his expression of nuclear safety concerns, Mr. Niedzielski's job position was downgraded by BG&E. In fact, just about the same time he voiced his concerns, he was demoted. As a result of the demotion, Mr. Niedzielski has suffered an income loss of \$553 per month. His protected activity was raising the nuclear safety concerns to his supervisors. Mr. Niedzielski seeks restoration of prior position, back pay with interest, correction of his job proficiency evaluation, compensation for mental anguish, and attorney fees.

Respondent's Statement of the Case³

Initially, in 1997, Mr. Niedzielski, as Supervisor of the Initial Training Unit, was responsible for overseeing the contractor who authored the November 1997 NRC licensing examination. Starting January 1, 1998, he was relieved of supervisory duties and assigned as a Senior

Operations Instructor. At that time, his primary responsibility was development of the January 1999 NRC licensing examination with a target completion date of November 1998. When Mr. Niedzielski prepared a progress memorandum in May 1998, he did not mention the requirement for additional resources. Between May 1998 and September 1998, Mr. Niedzielski informed his supervisor that the examination development was on track. However, in September 1998, Mr. Niedzielski informed his supervisor about the disqualification of a set of 25 questions he had intended to use in the upcoming test. At that point, the supervisor became more active in monitoring the development of the examination and discovered Mr. Niedzielski had actually accomplished very little. As a result, the supervisor issued a corrective action report to Mr. Niedzielski for "failure to meet expectations." Subsequently, Mr. Niedzielski completed a substantial portion of the examination and then in January 1999 discussed the situation with the next level supervisor. At this meeting, Mr. Niedzielski expressed his concerns about communication problems with his supervisors, lack of resources and nuclear safety.

Eventually, the January 1999 examination was administered satisfactorily indicating no problem with resources. Based on his initial performance problems with the examination, Mr. Niedzielski received on a March 1999 performance report an overall performance rating of 4, out of a possible 5, which matched the prior year performance rating. Mr. Niedzielski then placed his nuclear safety concern into official channels. The resulting investigations did not reveal any nuclear safety issues. On April 1, 1999, Mr. Niedzielski was reassigned to a different supervisor as an examination developer. Under the close supervision of the new supervisor, Mr. Niedzielski has completed the development of the September 2000 examination in a little over three weeks.

Based on these facts, there is no prohibited discrimination or retaliation. All the job actions taken by BG&E were based on Mr. Niedzielski's poor performance. There is no link between the alleged protected activity and the personnel actions. Notably, Mr. Niedzielski did not raise any nuclear safety concerns until January 1999.

Issues

1. Whether the Complainant, Mr. Robert Niedzielski, engaged in a protected activity under the Energy Reorganization Act by reporting the application of ineffective or insufficient resources in the development of an NRC licensing examination for January 1999.

2. If the Complainant, Mr. Robert Niedzielski, engaged in a protected activity, whether the Respondent, the Baltimore Gas & Electric Company, violated the employee protection provision of the Energy Reorganization Act by including adverse performance comments in the March 1999

performance appraisal for Mr. Robert Niedzielski, lowering his overall performance rating, and effectively reducing his monthly salary.

3. If the Complainant, Mr. Robert Niedzielski, engaged in a protected activity, whether the Respondent, the Baltimore Gas & Electric Company, violated the employee protection provision of the Energy Reorganization Act by downgrading his pay level from 79 to 78.

Summary of Documentary Evidence and Testimony

My decision in this case is based on the sworn testimony presented at the hearing and following documents admitted into evidence: CX 1 to 16 and RX 1 to 11.

Complainant's Documentary Exhibits

CX 1 - E-mail exchange between Mr. Niedzielski and Mr. Charlie Zapp. On December 21, 1998, Mr. Niedzielski asked Mr. Zapp what "compensation" he was going to receive for the overtime hours he had recently worked. The next day Mr. Zapp replied with questions about the number of hours and the type of compensation requested. He expressed his concern that because the exam project had not been accomplished very well that other individuals had to work on the "exam stuff on their own time, or off hours." In reply, on January 6, 1999, Mr. Niedzielski claimed 54 overtime hours for December. He also pointed out that to meet Mr. Zapp's expectations he worked "an 18 hour day." Finally, on January 7, 1999, Mr. Zapp defended his action requiring Mr. Niedzielski to work full time on a Saturday because other personnel had to work overtime to finish the project. He also noted some people worked till 2:00 a.m that Saturday night and returned on Sunday to complete the exam for submission to the NRC on Monday, December 21, 1998. Mr. Zapp denied the overtime request because the extra hours Mr. Niedzielski requested should have been worked earlier in the project. Mr. Zapp would approve comp time only as compensation for things beyond Mr. Niedzielski's control.

CX 2 - A November 1997 BG&E monthly report by Mr. Niedzielski to "N. L. Millis" which includes a statement, "LOIT Program quality was/is being challenged by the additional resources with the additional work load imposed by the NRC Exam development. . ."

CX 3 - September 22, 1998 E-mail correspondence to Mr. Zapp by Mr. Niedzielski outlining his benchmark efforts with two other utility companies. He concluded exam development needed to be supported by four individuals, one for each part of the examination (written, simulator, operations), with the remaining person acting as the overall coordinator. The hardest part of the exam to develop was the written portion. And, the development staff needed to be fully staffed at least 90 days prior to the examination date (at that time, the next BG&E exam according to Mr. Niedzielski was

136 days away). In response, Mr. James Lemon praised Mr. Niedzielski for his benchmark work.

[Page 5]

CX 4 - October 1997 Job Proficiency Statement for Senior Operations Instructor. This document sets out the requirements for achieving proficiency levels 1, 3, or 5. To achieve a level 5 rating under the category entitled, "Technical Knowledge," a person must "consistently" develop exam material that meets NRC standards. A level 5 for "Program Administration" requires that exams are developed "based on mutually agreed to commitments and program requirements." Finally, in the area of "Communications," a level 5 rating is appropriate when an individual's "[o]ral and written communications are consistently at a level which require [sic] no refinement to meet standards."

CX 5 - Job Proficiency Statement for NRC Exam Developer (undated). Level 5 of "Program Administration" requires exam development "based on mutually agreed to commitments and requirements." The individual must also assess "on-going progress of projects and provide a post project evaluation."

CX 6 - Guidelines for Establishing Proficiency Levels.⁴ A supervisor should meet periodically with an employee during the rating period "to discuss and document progress, problems, necessary resources, and any changes in the RIA (Results Incentive Award) goals or priorities." An employee must keep his or her supervisor "informed of changes that might require RIA goals to be revised to reflect current developments."

CX 7 - Mr. Niedzielski's Job Proficiency Evaluation, March 1999 to May 1999, as Senior Operations Instructor, prepared by Mr. Zapp on June 6, 1999 and received by Mr. Niedzielski on the same date. Mr. Niedzielski's overall rating proficiency level at both the start and end of the review period was "4." The evaluation resulted in no change in Mr. Niedzielski's salary. Mr. Zapp rated Mr. Niedzielski as a 4 at the start and end of the period for each area with the exception of "Communications" which contained a rating of 3. In this rating, Mr. Zapp explained how Mr. Niedzielski could raise his proficiency in each area. To move up in the area of Technical Knowledge, Mr. Zapp suggested Mr. Niedzielski "focus on improving proficiency in development of exams and exam analysis. Included in this is creating realistic time lines with deliverables and looking to meet deliverable commitments." Under Program Administration, Mr. Zapp urged him to inform his supervisors when time commitments will not be met. This communication should be a "statement of fact and not mixed with desired methods for performance." Finally, Mr. Zapp suggested Mr. Niedzielski use milestones for the exam project to permit work in "manageable" portions. Mr. Niedzielski did not respond in writing to the evaluation.

[Page 6]

CX 8 - Mr. Niedzielski's Job Proficiency Evaluation, January 1998 to March 1999, as Senior Operations Instructor, prepared by Mr. Zapp in March 1999 and reviewed by Mr. Lemon on March 8, 1999. While this evaluation indicated no change in the overall proficiency level, there was a decrease in salary level from 5 to 4. Mr. Zapp upgraded Mr. Niedzielski in Technical Knowledge from 2 to 4. However, he dropped the proficiency level in all the other critical performance areas. As improvement recommendations, Mr. Zapp suggested Mr. Niedzielski develop exams according to a mutually agreed-to time schedule. He also noted that Mr. Niedzielski should keep "supervision informed of challenges to exam development milestones" and prepare an exam development schedule "that has time contingencies built into it."

The next document in this exhibit is the Semi-Annual Proficiency Review, accomplished in July 1998. Mr. Zapp observed Mr. Niedzielski had put "forth substantial effort in becoming the site expert for exam writing." Mr. Niedzielski had also assembled a "milestone schedule of activities to develop the exam" which would enable the employer to meet the January 1999 due date. Finally, Mr. Zapp stated, "Bob has done well communicating his needs for the exam development process."

Mr. Zapp also provided extensive comments at the close-out of the reporting period in March 1999. While Mr. Niedzielski had the necessary knowledge to develop an examination, he did "not fully meet expectations in the area of project management." Specifically, at "various points progress reports were requested and reported as on track." However, following a request in September 1998 about development details, Mr. Zapp discovered "that very little progress had been made." An "accurate status was not provided until the end of September." Mr. Niedzielski provided two reasons for the set back. First, he discovered in the fall that 25 questions he planned to use were administered in a different exam and consequently disqualified. Second, according to Mr. Zapp, Mr. Niedzielski was "waiting for the formation of an exam team." Mr. Zapp noted that he had previously informed Mr. Niedzielski that there were insufficient resources to "employ this method." After Mr. Zapp instituted weekly reports, he determined they would not meet the exam deadline. As a result, he had a portion of the exam developed by other individuals who put in "long hours" to complete the project. In fact, the exam was completed the night before it was due. Part of the problem was Mr. Niedzielski's focus on development logistics and protocol, which did not address "the main priority of developing an acceptable NRC Exam in the allotted time frame." Mr. Niedzielski also advocated a team approach but "this could not be accomplished at this time due to limited resources." Mr. Zapp concluded Mr. Niedzielski "has not used his time wisely during this period."

In his response to the evaluation, Mr. Niedzielski protested its contents due to inaccuracies of statements and the absence of any discussion of performance deficiencies until completion of the evaluation. He set out specific discrepancies in the evaluation and noted there was no agreed-to exam program. Concerning resources, Mr. Niedzielski believed that remained an unresolved issue and that the proper way to develop an examination had not been addressed.

On March 3, 1999, after reviewing Mr. Niedzielski's response and his own information, Mr. Zapp determined his evaluation did not contain inaccuracies.

CX 9 - 1999 NRC Exam Hour Summary for Mr. Niedzielski reflecting 1,087 hours from June 28, 1998 to January 31, 1999 with 731.5 hours expended on the written exam.

[Page 7]

CX 10 - NRC Exam Process, dated May 5, 1998, prepared by Mr. Niedzielski for Mr. Zapp and other individuals setting out his proposal for development of the NRC examination. Among numerous suggestions, Mr. Niedzielski recommends starting the development process at least six months prior to the exam date and developing an exam scheduled with monitored milestones. He estimated that "805 man-hours" were necessary for development of future exams and believed the development would require "one (maximum of two) exam authors. . ."

CX 11 - A document entitled, "Nuclear Safety Concern," which carries an annotation, "submitted 3/19/99." The document indicates that the resources available for development of the 1999 NRC examination were ineffective based on NRC quality expectations. Mr. Niedzielski states he raised his concern with immediate supervisors between June 1998 and the end of September 1998. Based on bench marking, Mr. Niedzielski was aware that one individual "working on the exam development was insufficient and prompt action was necessary to ensure exam materials would be ready for the NRC due dates." In an October 1998 meeting, "management" indicated the resource concern was invalid; the real problem was lack of performance by Mr. Niedzielski. Management indicated he would receive no help. Mr. Niedzielski recorded the estimated total man-hours from June 22, 1998 to January 2, 1999 to be 1,655 man-hours for 25 people. Mr. Niedzielski states he verbally raised the nuclear safety concern with management on January 6, 1999 after he discussed the issue with the Nuclear Safety Concerns Coordinator "to ensure the concern met the scope" of the NRC Nuclear Safety Concerns Program. Finally, Mr. Niedzielski comments that since the first notification of his resource concern, he has been subjected to adverse personnel actions.

CX 12 - Examination Security Agreement signed by several individuals who took the examination.

CX 13 - 1998 Result Incentive Plan signed by Mr. Niedzielski and Mr. Zapp on July 6, 1998 and January 19, 1999. Success for development of the licensing exam was defined as meeting the NRC requirements.

CX 14 - Job Summary for NRC License Exam Developer, dated April 21, 1999, with a pay grade of 78. The summary indicates the individual "develops, reviews, and validates all portions of the exam."

CX 15 - Initial Training Unit's Evaluation documents a review of the failure of some candidates to pass the 1997 NRC Shift Engineer licensing examination. The detailed document identifies several contributing factors and root causes for the examination failures. The root cause was inadequate use of evaluation tools to assess applicants' weaknesses. Without specifying details, the study listed as a contributing factor the contractor's failure to meet quality and timeliness expectations.

[Page 8]

CX 16 - An April/May 1999 E-mail correspondence from Mr. Niedzielski to Mr. Phifer providing a chronological summary to support his grievance. Mr. Niedzielski documents his efforts on the exam development from January 1998 through November 1998. He then notes that on October 5, 1998, in response to a request for a written update on the exam development, he indicated the status was "0%" due to the disqualification of 25 questions. Based on his bench marking, Mr. Niedzielski had to "rethink the manpower needs" in September and he notified supervision of his concern. He believed at least two exam writers were needed to develop the exam material "due to the complexity and accuracy required for a federal law licensing action."

Respondent's Documentary Exhibits

RX 1 - Nuclear Performance Assessment Department Hotline Report, signed July 27, 1999. Between March 22 and June 18, 1999, Mr. Phifer conducted an investigation concerning Mr. Niedzielski's March 19, 1999 nuclear safety complaint that the resources available for the development of the 1999 NRC examination were ineffective to meet NRC quality expectations. The three adverse actions asserted were a formal warning in October 1998, a March 1999 reduction in pay, and a supervisor statement to "get a new job."

The investigator observed that due to quality problems and exam failures with a 1997 examination developed by a contractor, BG&E established a position for development of the next examination. After numerous interviews and a document review, the investigator concluded sufficient resources had been available for the 1999 NRC exam. Reacting to "progress slippage," management assigned additional personnel to complete the exam development on time. At the same time, "[m]ore robust supervisory oversight of the exam development process could have prevented the need for additional resources." Eventually, the NRC found the overall quality of the prepared 1999 exam to be "acceptable" and the written examination was characterized as "high quality."

The investigator obtained an admission from a supervisor about making a statement to Mr. Niedzielski about a "new job" but not in the context presented by Mr. Niedzielski. However, Mr. Niedzielski did not present "compelling information" that the performance observations and personnel actions were inappropriate. In addition, the investigator determined Mr. Niedzielski's concern "had no nuclear safety significance."

RX 2 - Nuclear Safety Concerns Program, Calvert Cliffs Nuclear Power Plant, dated April 15, 1998. This instruction sets out the process BG&E utilizes to process employees' nuclear safety concerns. According to paragraph 1.2 C., "Scope/Applicability" the "procedure does not apply to personnel or administrative type issues which do not potentially have a direct impact on nuclear safety."

RX 3 - Statements of Charles G. Phifer, Jr., Nancy A. Winters, and Charles C. Zapp, dated October 29, 1999. As the company's Nuclear Safety Concerns Program Manager, Mr. Phifer was approached by Mr. Niedzielski "early in 1999" about his nuclear safety concerns. Mr. Phifer eventually investigated the complaint and prepared the investigative report (see RX 1). He does not believe the performance and compensation actions involving Mr. Niedzielski were taken in response to his report of a safety concern.

[Page 9]

Ms. Nancy Winters, General Supervisor of Nuclear Training, considered Mr. Niedzielski's planning and oversight ineffective. He was provided "ample" resources and failed to effectively use those resources. He also failed to keep Mr. Zapp and Ms. Winters adequately informed of the state of his progress. On January 6, 1999, Ms. Winters met with Mr. Niedzielski to discuss his concerns. During that meeting, she did not tell him to get a new job. Instead, based on his complaints of communications problems with Mr. Zapp, she suggested he consider making efforts to transfer to another area of the plant.

Mr. Zapp was Mr. Niedzielski's direct supervisor. He considered Mr. Niedzielski's planning and execution ineffective. Mr. Niedzielski's failure to properly use resources led to the problems associated with the examination. In addition, Mr. Niedzielski "persistently failed" to keep Mr. Zapp informed and "allowed a crisis situation to develop." The personnel actions were solely due to his poor performance.

RX 4 - E mail correspondence from December 8, 1997 indicating Mr. Niedzielski's request for an immediate reassignment of duties. Due to health issues, family concerns, and increasing workload, he believed a reduction in supervisory responsibilities was warranted.

RX 5 - NRC Exam Process, dated May 5, 1998 (see CX 10).

RX 6 - February 25, 1999 NRC report concerning the January 1999 NRC examination at the BG&E Calvert Cliffs Nuclear Power Plant, Units 1 and 2, Lusby, Maryland.⁵ In the document, the NRC observes that "all segments of the examination were developed by Baltimore Gas and Electric Personnel, while the NRC provided oversight and final approval prior to the administration of the exam." In fact, the NRC "subsequently reviewed and validated all portions of the proposed exams" (page 1 of the Report Details). All applicants passed the examination and the overall quality of the initial submission was "acceptable." The written portion of the exam was graded "high quality" and only three of 129 questions were changed by the NRC. Subsequently, "Calvert Cliffs

personnel incorporated the agreed-to comments and finalized the exams." Likewise, the proposed simulator scenarios were "high quality." And, "operator licensing and eligibility" at Calvert Cliffs were being conducted in accordance with NRC regulations.

RX 7 - Mr. Niedzielski's BG&E personnel record, including performance reports from August 1994 through March 1999. The record also contains Mr. Niedzielski's October 1979 nuclear operator license for Calvert Cliffs. In the three appraisals accomplished by Mr. Zapp from August 1994 to January 1998, he rated Mr. Niedzielski 5 in every critical area, 5 in overall performance, and 5 in salary level.

[Page 10]

On October 8, 1998, Mr. Zapp submitted a corrective action report concerning Mr. Niedzielski's failure to meet expectations and gave him a "formal warning." Mr. Niedzielski had been assigned responsibility for exam development at the beginning of 1998. By October 1998, "very little progress" had been made. As a consequence, Mr. Zapp would have to apply additional resources to ensure the test is completed with sufficient time remaining to enable on-site quality reviews and validation prior to forwarding the examination to the NRC. These measures would increase the cost of the exam development. In addition, Mr. Niedzielski's lack of performance compressed "the amount of time available to complete the project." As corrective actions, Mr. Zapp directed Mr. Niedzielski to take personal responsibility for his position and if assignments cannot be met to present his supervisor with a plan to complete the work "without placing unnecessary burdens on his co-workers."

In his reply to the formal warning, Mr. Niedzielski asserted the corrective action was "unwarranted" and did not accurately reflect the work agreement he had with Mr. Zapp. He believed the situation developed due to ineffective communication, unrecognized workload and insufficient resources. Mr. Niedzielski gave Mr. Zapp routine schedule updates starting in April 1998. Based on his conversations with Mr. Zapp, Mr. Niedzielski believed other supervisory review resources would be made available. In addition, his bench marking efforts demonstrated that an exam team needed to be utilized for development of the test. Because he had not completed the exam project in October 1998, he reported his progress to Mr. Zapp as 0%.

In an extensive response to Mr. Niedzielski's statement, Mr. Zapp sets out in great detail the basis for his corrective action. He agreed that communication was a problem. Based on past experience, he wanted to avoid a last minute crunch to develop an exam. Mr. Zapp became very frustrated when he learned in October 1998 that Mr. Niedzielski's inaction was going to cause the same time of last minute effort to complete an examination.

RX 8 - Mr. Niedzielski's salary records, July 1976 to May 1999.

RX 9 - Response of Mr. Michael Rind, counsel for BG&E, to OSHA's inquiry of Mr. Niedzielski's whistle blower complaint. He observes that in 1996, NRC began to turn over to nuclear licensees responsibility for developing the three part licensing examination. BG&E's first experience with such an examination occurred in November 1997. A contractor prepared the exam and the results were not completely satisfactory. During the development of contractor examination, Mr. Niedzielski had supervisory responsibility over the process. After the poor results, and due to other supervisory issues, Mr. Zapp removed Mr. Niedzielski as a supervisor and assigned him the task to write the next exam. Concerning the January 1999 examination, due to delays attributable to Mr. Niedzielski, a review of the examination had to be "conducted on a crisis basis the week before Christmas week." Mr. Niedzielski is not due over time pay because he was in a grade 78 pay level and did not have supervisory responsibilities. Finally, BG&E treats any issue relating to NRC regulated activities as a "nuclear safety concern." However, the company's investigation disclosed that sufficient resources had been provided for development of the examination.

[Page 11]

RX 10 - Project Flow Chart for development of the 2000 licensing examination.

Sworn Testimony for the Complainant

Mr. Robert Niedzielski (TR, pages 48 to 240 and 313 to 321)

Mr. Niedzielski, after six years in the U.S. Navy, came to work for BG&E in 1976 and spent most of his employment in reactor operations. He obtained his senior reactor operator license in 1983 and is presently assigned as an NRC exam writer in the Nuclear Training Section.

On March 9, 1999, Mr. James Lemon approved the job proficiency review prepared by Mr. Charles Zapp, Mr. Niedzielski's supervisor. Due to the approval of that review, Mr. Niedzielski's overall proficiency level dropped from 5 to 4, which led to a 5% pay reduction. Because he considered the pay reduction a significant job action against him, Mr. Niedzielski filed his complaint to the NRC and Department of Labor on August 27, 1999.

In November 1997, Mr. Niedzielski's immediate supervisor, Mr. Charles Zapp, informed Mr. Niedzielski, then the Supervisor of Initial Training Unit, that he was going to be reassigned due to his declining effectiveness as supervisor. Prior to that conversation, there had been problems and conflicts in the unit. Based on Mr. Niedzielski's suggestion, Dr. Ray Mosko, a company psychologist, interviewed Mr. Niedzielski's employees (Mr. Niedzielski had also seen Dr. Mosko in early 1997 for personal issues and some work-related problems, and several years earlier as part of the licensing process). On December 8, 1997, Mr. Niedzielski asked his immediate supervisor, Mr. Charles Zapp, for an immediate reassignment due to family concerns and

an increasing workload. Mr. Niedzielski was told to put in the request. At the same time, he agreed that his supervision effectiveness had decreased and health issues required a reduction in his supervisory responsibilities.

On January 1, 1998, Mr. Niedzielski was informed that he was being removed as a supervisor due to unsatisfactory performance and assigned to the only available job, NRC examination writer as a Senior Operations Instructor. As a NRC examination writer, Mr. Niedzielski was responsible for preparation of a "very large, integrated examination" (TR, page 52). He was aware the examination had to be administered in January 1999. As part of his preparation for the new work, he attended an NRC exam workshop in Atlanta, Georgia that same month. At the workshop, Mr. Niedzielski learned that exam integrity is both important and broad. Also, earlier, in the fall of 1997, Mr. Niedzielski had developed some understanding of the process in developing an exam by observing a contractor's examination development efforts.

After he returned from the workshop, Mr. Niedzielski provided Mr. Zapp a trip report which contained several recommendations, including consideration of the amount of resources needed for the exam preparation. At the workshop, the man-hour estimate for examination preparation ran from 400 to 1000. Also, upon his return, Mr. Niedzielski was assigned to develop a retest examination for a candidate who had failed the November 1997 written test. Since the next available test date was mid-March, Mr. Niedzielski informed Mr. Zapp that he would need administrative help and another licensed senior reactor operator to meet that date. When Mr. Niedzielski didn't receive the additional administrative resources, he advised Mr. Zapp that he could not meet the mid-March deadline. Mr. Zapp told him to arrange another testing date. Accordingly, Mr. Niedzielski arranged a later testing date.

[Page 12]

During this period, Mr. Zapp gave Mr. Niedzielski other work assignments, such as developing a secure exam room. Mr. Zapp also agreed that Mr. Niedzielski should develop an administrative procedure to guide exam development which included all three parts of the NRC examination (written examination, simulator scenarios and a plant walk-through). From mid-April through May, 1998, Mr. Niedzielski worked on the development schedule and attempted to obtain man-hour estimates from the contractor who prepared the 1997 examination. The estimate was about 800 man-hours.

Mr. Niedzielski gave Mr. Zapp his exam development plan in May 1998 (CX 10 and RX 5). The plan indicated the exam development should start six months before the due date and involve one, or a maximum of two exam writers. Two identified major milestones were November 21, 1998 (exam outline) and December 21, 1998 (exam materials). The plan did not contain any statement concerning insufficient resources for the preparation of the exam because Mr. Niedzielski had already verbally expressed his concerns to Mr. Zapp. The first step in the exam development is outlining each of the three parts from a book of approximately 6,000 knowledge items. The outline material is

then validated by an expert or through application. This later process is a collaborative effort involving numerous Calvert Cliffs people. In mid-June 1998, he discussed the plan with Mr. Zapp and obtained his agreement with the plan's recommendations. One of the recommendations involved the assignment of only one or two individuals (due to exam integrity concerns) to write the exam over the next six months. Then, about a week later, Mr. Niedzielski gave Mr. Zapp the exam outlines to review. Included in the outline were 25 questions from a previous examination. Despite repeated attempts to engage Mr. Zapp about the outline, he didn't discuss the outline with Mr. Niedzielski until August 3, 1998.

In August 1998, Mr. Zapp directed Mr. Niedzielski to work on his instructor qualifications, learn to use the simulator for development of the second part of the examination, develop emergency response scenarios, and make sure he didn't lose any leave hours. In response, Mr. Niedzielski took a vacation in early August 1998. He also met with his new general supervisor, Ms. Nancy Winters, and indicated he was attempting to work out differences of opinion with Mr. Zapp. Also in August 1998, the NRC provided the firm exam dates to BG&E in January 1999.

In early September 1998, Mr. Niedzielski contacted other facilities to obtain information about their recently administered exams. His contacts indicated the development hours "were just jumping up on them" and the 800 man-hour estimate needed to be doubled or tripled (TR, page 69). Based on his bench marking, Mr. Niedzielski informed Mr. Zapp and management his concern about conflict of resources in developing the examination. He also requested help due to a lack of progress in development of the simulator portion of the exam. On September 22, 1998, Mr. Zapp agreed that Mr. Niedzielski should receive some help on the simulator scenario. On September 30, 1998, Mr. Niedzielski learned that the 25 questions he had planned to use for part of the 125 question requirement for the written exam were disqualified because they were being used for an audit exam. When Mr. Niedzielski informed Mr. Zapp of the loss of the 25 questions, Mr. Zapp seemed ambivalent. However, Mr. Niedzielski knew he'd have to prepare new questions to be validated.

[Page 13]

Early on October 5, 1998, Mr. Niedzielski had pointed out to Mr. Zapp that other utilities had 3 people working in exam development six months to a year prior to the exam. Then, later in the day, at Mr. Zapp's request, Mr. Niedzielski submitted a written report on the status of the exam. On the report, due to the loss of the 25 questions, Mr. Niedzielski indicated that zero questions were prepared for the written exam. Mr. Zapp didn't understand the zero response, became very upset and angry, characterized the situation as a performance issue, and informed Mr. Niedzielski that no one was going to help him. Mr. Zapp believed Mr. Niedzielski had not provided accurate exam status reports from June to October 1998. Mr. Niedzielski believed Mr. Zapp's response was unjustified and offered him the opportunity to review all the work he had accomplished. Mr. Zapp did not accept that offer.

When Mr. Zapp presented a Corrective Action Report to Mr. Niedzielski around October 8, 1998, he first stated, without explanation, that he hated to take the action. The action was a formal warning. Mr. Niedzielski was not placed on probation or suspended. While Mr. Niedzielski understood Mr. Zapp's concern for getting the exam completed, he didn't think a corrective action was necessary. In response to the corrective action, Mr. Niedzielski prepared an hourly summary, starting with the week ending June 28, 1998 (CX 9). Even though he had really started exam preparation in April 1998, Mr. Niedzielski used June 28th as the start date because his planner clearly indicated he started the exam work then. Mr. Niedzielski is not able to estimate how much time he devoted to exam development in April, May, and June 1998. According to his summary, during July, August, and September 1998, he worked an average of 25 hours per week, with 15 hours per week associated with exam development. Also, during this period, Mr. Zapp permitted Mr. Niedzielski to work at home and have flexible hours. From April through September 1998, Mr. Niedzielski informed Mr. Zapp that the exam development was on track. Mr. Niedzielski first complained about insufficient time for completion in the latter part of September 1998, after he lost the use of the 25 questions.

After that exchange, the work situation was tense and in mid-October 1998, Mr. Zapp informed Mr. Niedzielski that due to a lack of confidence in his work, Mr. Zapp would assign the simulator and walk-through portions of the exam to other individuals. Mr. Niedzielski's sole task was the written examination. As a result, Mr. Niedzielski focused on the written portion of the exam and another individual began to work in late October on the simulator scenarios. However, into early November, no one had addressed the walk-through. Between September 28, 1998 and to mid-October 1998, Mr. Niedzielski developed 91 exam questions. By the end of September 1998, he had completed outlines for eight of ten measurement standards, but none were ready for review. Likewise, by the end of September 1998, he had completed only one of four scenarios for review.

After he submitted his written questions on October 18, 1998 for validation, he started working on the walk-through. However, when Mr. Niedzielski discovered in the later part of November that no effort was being made to validate his written questions, he obtained Mr. Zapp's approval to coordinate the validation work with other operators. The exam outline was submitted to the NRC on November 21, 1998 and the written portion of the exam was presented to the NRC by the December 14, 1998 due date. Mr. Niedzielski then turned to completion of the simulator and walk-through portions of the exam and worked with other operators and Mr. Zapp through weekends to complete the walkthrough portion by the December 21, 1998 deadline.

[Page 14]

The entire examination, including the written test, the simulator scenarios, and the job performance measures, was accomplished in two and a half months from October 8, 1998 to December 21, 1998. Mr. Zapp and Mr. Birney had to accomplish their regular duties and then worked overtime to review the examination materials.

Following his submissions, Mr. Niedzielski went on vacation for Christmas. He also asked Mr. Zapp for approval of overtime and compensation time for fifty hours that he expended in November and December.

When Mr. Niedzielski returned from vacation around January 4, 1999, he expressed his concern to Mr. Jerry Phifer about resource management for the NRC exam development. From Mr. Niedzielski's perspective, every time he asked for some resources, he received something less. He asked Mr. Phifer, "is this a nuclear safety issue?"(TR, page 84). After reviewing an administrative procedure manual, NS 101, Mr. Phifer responded that the concerns about resources might be a valid nuclear safety concern. Mr. Niedzielski also reviewed the procedure manual and concluded that because the NRC exam process was a regulated activity by the NRC, his complaints about lack of resources for the exam preparation was a nuclear safety concern. From past experience, he was also aware that individuals who failed the 1997 exam reacted negatively. Consequently, Mr. Niedzielski raised the nuclear safety issue to management on January 6, 1999, starting with Mr. Zapp. Mr. Zapp didn't see it as a nuclear safety concern. Instead, Mr. Zapp believed it was a plant operations issue. Despite his opinion and without any sign of anger, Mr. Zapp encouraged Mr. Niedzielski to proceed with the process.

On January 6, 1999, Mr. Niedzielski also presented his complaint to Ms. Winters. She did not see a nuclear safety issue. Instead, she stated there was a performance problem, noting the October 1998 corrective action report. In addition to mentioning his safety concern, Mr. Niedzielski indicated he didn't think Mr. Zapp's corrective action was fair because Mr. Zapp could have discovered by himself the progress of the exam development. Mr. Zapp was also part of the problem because he worked on other projects and there was a communication problem. In response, Ms. Winters asked if Mr. Niedzielski had sent out his resume and suggested he look for another job in Baltimore. Mr. Niedzielski considered Ms. Winters' statement a threat because he had raised a nuclear safety concern. After this meeting, Mr. Niedzielski spoke with Mr. Zapp about Ms. Winters' statements. According to Mr. Niedzielski, Mr. Zapp responded that if Mr. Niedzielski went against Ms. Winters, Mr. Niedzielski would pay.

Mr. Niedzielski next took his concern to Mr. James Lemon, the department manager. Mr. Lemon appeared to be listening to Mr. Niedzielski's complaints and asked some questions about the resource problems.

The day after raising his nuclear safety concern, January 7, 1999, Mr. Niedzielski received an e-mail from Mr. Zapp denying his request to be compensated for his overtime. The stated reason for the denial was that due to Mr. Niedzielski's poor planning other employees had to work overtime. Specifically, he was angry because Mr. Niedzielski's poor planning caused other people to work overtime. So, Mr. Zapp did not think Mr. Niedzielski should receive overtime compensation. Mr. Niedzielski viewed the denial as discrimination for having reported the safety concern.

After the NRC examination was administered on January 22, 1999, Mr. Niedzielski analyzed the test result and found the test was a "picture perfect exam" (TR, page 92). On January 25, 1999 the other portions of the exam were administered. Around this period, Mr. Niedzielski agreed to Mr. Zapp's proposal that his annual performance appraisal, which was due in January, be delayed because they were still busy with the exam administration. Mr. Zapp didn't explain why the appraisal wasn't accomplished in February 1999.

All 11 applicants who took the January 1999 examination passed all portions of the test and the NRC concluded the submitted written examination and the proposed simulator scenarios were of high quality.

On March 6, 1999, Mr. Zapp conducted a job proficiency review with Mr. Niedzielski. Each area in the appraisal was rated one level lower and it involved a recommended pay decrease. Mr. Niedzielski was surprised by the downgrading. He pointed out that the October 1998 corrective action was just a one-time event. Mr. Niedzielski did not believe the ratings reflected all his work effort. Because the appraisal didn't make any sense to Mr. Niedzielski, he considered it really reflected his raising the nuclear safety concern. While he understood Mr. Zapp's concern was performance, he also believed the performance criticism was inappropriate because he had been tasked to prepare an examination that other utilities typically assigned three people to accomplish. Mr. Niedzielski then provided Mr. Zapp some additional factors to consider for the final appraisal. Later, after reading Mr. Niedzielski's inputs, Mr. Zapp declined to change the job proficiency rating. Mr. Niedzielski annotated his disagreement with the rating on the back of the appraisal. Mr. Zapp signed the report on March 9, 1999. He had also considered the October corrective report an adverse action but other supervisors told him not to worry about it.

On March 19, 1999, Mr. Niedzielski formally submitted his nuclear safety concern to Mr. Phifer on the basis that the NRC expects a utility to provide adequate resources to develop licensing exam (CX 11). The NRC is concerned about any compromise of the exam process. Mr. Niedzielski pointed out that on September 22, 1998, Mr. Zapp had agreed to provide additional resources but after he got angry on October 5, 1998, Mr. Zapp forgot about the agreement. The investigation continued on into the end of May when Ms. Pines concluded the company did nothing wrong. She informed Mr. Niedzielski that the October 1998 Corrective Action Report and the March 1999 job proficiency evaluation were appropriate. In August 1999, Mr. Niedzielski asked Mr. Phifer about the investigation and he indicated he was finishing it up. But, by the end of August 1999 to comply with the 180 day deadline, Mr. Niedzielski filed his discrimination complaint. After Mr. Phifer completed the report, he refused to give Mr. Niedzielski a copy. Mr. Niedzielski only saw the report after he had submitted his complaint to the U.S. Department of Labor.

On March 22, 1999, Mr. Niedzielski was called into a meeting with Ms. Winters, Mr. Zapp and Mr. Ray Mosko, an industrial psychologist; they discussed the situation; and, Mr. Niedzielski explained his point of view. At the conclusion of the meeting, Ms.

Winters still believed there had been a performance problem. Then, near the end of April 1999, Ms. Winters told Mr. Niedzielski that she was reorganizing the Operations Training Unit. Mr. Zapp was moving to another job. Mr. Niedzielski would report to Mr. Jim Evans as an exam writer at a pay level of 78, rather than his previous level of 79, which represented an additional reduction in pay of 5%. Ms. Winters explained that Mr. Niedzielski would be placed under close supervision. In addition, she indicated he was not entitled to salary protection. However, later she determined his pay would be frozen at its level prior to the reorganization. At the time the reorganization was announced, Mr. John Hornick told Mr. Niedzielski that he didn't think it was right.

[Page 16]

While working for Mr. Evans, Mr. Niedzielski has been the one individual dedicated to the development of an NRC licensing exam. Mr. Niedzielski also had other duties. Between September and December 1999, Mr. Niedzielski developed 125 questions for the September 2000 examination. It took him 94 hours to develop those questions, 26 hours to complete the exam outline, and 9.5 hours to accomplish the job performance measures. Mr. Niedzielski agrees that he accomplished in 16 days under Mr. Evans' supervision what he did not complete in the six months between April 1998 through September 1998 and what he did finish between October 1998 and January 1999.

In 1998, when he was first assigned as an exam writer, Mr. Niedzielski's monthly salary was about \$5,600. Following the March 1999 evaluation, there was a 5% pay reduction as of April 1, 1999. Based on his calculations, Mr. Niedzielski believes he has lost \$553 per month from May 1, 1999. Effectively, due to a company policy, the change in pay level following the reorganization did not reduce his pay because his salary was frozen.

Mr. Niedzielski also suffered mental anguish after Ms. Winter's January 1999 threat about finding another job. During 1998, Mr. Niedzielski was under a lot of pressure, he suffered at least one episode of blinding ocular migraines; two more attacks occurred in 1999. In addition, he believed his professional reputation had been damaged because at least one individual had heard Mr. Niedzielski was considered a performance problem. This news made it difficult to concentrate on developing the exam materials. At the same time, other supervisors in the plant indicated their agreement with Mr. Niedzielski about the resource problem and gave him positive reinforcement. During the summer of 1998, Mr. Niedzielski also experienced personal stresses related to his family.

Between May 5, 1998 and September 1998, Mr. Niedzielski had 25 questions ready for review. Because the questions had already been written for the previous April 1998 examination, Mr. Niedzielski did not actually develop the questions. Prior to the end of September 1998, Mr. Niedzielski had not prepared any new questions even though his development plan indicated work on the exam should start in July 1998, six months prior to the due date.

Mr. Niedzielski agrees that BG&E eventually provided sufficient resources to complete and administer the NRC examination by January 1999. Mr. Niedzielski's real dispute with BG&E concerned the allocation of resources to produce the examination. He believed a team approach to exam development was appropriate whereas Mr. Zapp believed one individual could accomplish the task. He was also concerned, based on the company's experience when two individuals failed the November 1997 written exam, the applicants might complain about poor quality of the examination. Mr. Niedzielski did not discuss a nuclear safety concern with his supervision until January 1999. Neither Mr. Zapp nor Ms. Winters expressed any irritation over Mr. Niedzielski's safety complaint.

[Page 17]

Mr. Niedzielski takes personal responsibility for completing specific assignments. And, as a supervisor, he expected his employees to develop exams within a specified time frame to permit adequate review time. Mr. Niedzielski has counseled employees for failing to meet expectations. In such situations, a corrective action may be necessary and the job deficiencies may need to be reflected in a job proficiency evaluation.

Although according to his plan for development of the exam, Mr. Niedzielski believed he was on schedule in September 1998, he became concerned about the need for additional resources based on two factors. First, he had heard from other utilities that the original estimates for completing development may be off by 100%. Second, he had never developed a simulator scenario. So, he thought an additional person would be helpful for the simulator development.

Mr. Marc Niedzielski (TR, pages 240 to 252)

Mr. Marc Niedzielski is Mr. Robert Niedzielski's younger brother. Mr. Niedzielski works as a Deputy Attorney General in Delaware. In weekly telephone conversations, he has witnessed his brother's mental anguish about the discrimination. As a loyal and dedicated worker for BG&E, Mr. Robert Niedzielski has been devastated by the company's actions. He was punished for trying to tell the company to do the right thing.

His brother first discussed the work-related problems "sometime in 1998, and earlier than that" (TR, page 246). He first mentioned the nuclear safety concern in late 1998 or early 1999 and a corresponding job demotion and reduction in pay. Mr. Robert Niedzielski did not indicate any monetary damage associated with his anguish. However, he believed he was being discriminated against due to his nuclear safety report.

Mr. James R. Evans (TR, pages 253 to 279)⁶

Mr. James Evans, a 13 year employee of BG&E, is presently the Supervisor of the Training Support Unit. Mr. Evans started supervising Mr. Niedzielski on either April 1 or May 1, 1999. Since that time, Mr. Niedzielski has produced timely work. He rated Mr. Niedzielski as an overall 4, meeting expectations, in December 1999. At that time, Mr.

Niedzielski received an incentive award. Mr. Evans gave incentive awards to all 11 individuals under his supervision.

Since working for Mr. Evans, Mr. Niedzielski's primary responsibility has been development of the NRC examination. Mr. Niedzielski developed outlines for the written exam and job performance evaluation, 125 questions for the written exam and the job performance portion of the exam. According to an NRC exam development project plan (RX 11), Mr. Niedzielski took 26 hours for test outline, 9.5 hours for the job performance outline, and 94 hours for the 125 questions for the September 2000 exam. During this development, Mr. Niedzielski has been the primary resource. In addition, Mr. Evans is available and a training specialist conducts the psychometric review of the test. Two other individuals are developing the simulator scenarios. Mr. Evans believes that one of those employees assisted in the simulator scenarios for the January 1999 examination. Mr. Evans believes one person is sufficient to write the examination for review. And, at least two employees are necessary for a finished exam.

[Page 18]

Mr. Niedzielski has not complained about a lack of resources while working for Mr. Evans. While Mr. Evans began supervising Mr. Niedzielski, he was given instructions to maintain constant communications with Mr. Niedzielski and to validate the progress of the exam development. Mr. Evans' supervisor is Ms. Winters.

Mr. Edmund Chrzanowski (TR, pages 280 to 286)

A 23 year BG&E employee, Mr. Chrzanowski is the Simulator Support Work Group Leader. He is aware that Mr. Niedzielski has used a scenario developer as a development tool.

Mr. Ray Wesley Smith (TR, pages 288 to 305)

Mr. Smith is a BG&E Systems Engineer and has worked for BG&E for 15 years. He has known Mr. Niedzielski for the same period of time. During the period of the exam development, Mr. Smith believes Mr. Niedzielski put in his best effort and he explained to Mr. Smith his difficulties in having a conversation with Mr. Zapp. Mr. Niedzielski also mentioned his difficulty with getting additional resources. In fact, resource shortage was a common problem at BG&E.

Mr. Smith does not have specific knowledge concerning exam development for the operations area. In February and July 1998 and September 1999, Mr. Niedzielski told him that he was concerned about nuclear safety with Mr. Smith associated with the confidentiality and integrity of exam questions. And, while Mr. Niedzielski didn't complain about discrimination, he did feel he was under his supervisor's watchful eye.

Mrs. Judy K. Niedzielski (TR, page 322 to 335)

Mrs. Judy Niedzielski has been married to Mr. Niedzielski for 22 years. Mrs. Niedzielski recalls her husband explaining that due to his nuclear safety concern the company was taking him down to a lower position and pay. In response to the company actions, he became very depressed and took anti-depression medication. He first talked about it three years ago, about the time he was demoted from a supervisory position in January 1998. Later, he also suffered a pay reduction.

Mr. Robert W. Scott Jr. (TR, page 336 to 352)

Mr. Robert Scott, a BG&E Senior Operations Instructor, has been with the company 20 years. As an instructor, Mr. Scott trains candidates for an operator's license. He has known Mr. Niedzielski for about 10 years and worked for him from 1994 to 1997. During 1998, he saw Mr. Niedzielski about once a week. He believes the company provided sufficient instructors for the exam from 1997 to 1999. In particular, for the second exam, "there was more than enough time to develop that exam" (TR, page 342). Based on the results of the 1997 exam, the company didn't do a good job validating the contractor's work on the exam.

[Page 19]

When Mr. Niedzielski was first a supervisor in 1994, everything was okay. But, later it became difficult to communicate with him. Eventually, a company psychologist interviewed all the employees, including Mr. Scott, and validated the communications difficulties.

Mr. John F. Hornick (TR, pages 354 to 373)

Mr. Hornick, a 10 year BG&E employee, has known Mr. Niedzielski since starting with the company. In April 1999, Mr. Hornick, as supervisor of initial training, had some concern about the company's reorganization. The plant was due for an operations evaluation in June 1999 and Mr. Hornick was concerned that if Mr. Zapp were removed as the general supervisor of operations training, then the remaining individuals, including Mr. Hornick, might have to answer for work Mr. Zapp had done over the prior four years. His concerns were addressed when Mr. Zapp remained in operations training through June to answer any potential questions. In retrospect, the reorganization was the right thing to do.

When Mr. Hornick replaced Mr. Niedzielski as supervisor of the initial training unit in January 1998, the employee morale was pretty low due to the results of the November 1997 test. Several individuals believed their supervisor had not listened to them.

In April or May 1998, after Mr. Niedzielski returned from a conference with some ideas about using prior examination questions for a subsequent audit test, Mr. Hornick informed Mr. Niedzielski that the questions from the April 1998 retake examination were going to be used as an audit examination for the candidates who were going to take the

January 1999 examination. Since the questions were used as a pretest, a very limited number could also be used on the 1999 examination.

From Mr. Hornick's perspective, Mr. Niedzielski had sufficient resources to prepare the January 1999 examination.

Sworn Testimony for the Respondent

Mr. Charles Phifer (TR, pages 376 to 399)

Mr. Phifer is the BG&E Nuclear Safety Concerns Program Manager. He has worked over 21 years with the company. As the program manager, Mr. Phifer takes in nuclear safety inputs from employees and appoints a team to investigate the concerns. The company's written policy is to maintain a safety conscious work environment where employees feel free to raise safety concerns without fear of retaliation. The company does not tolerate discrimination or harassment because it's both illegal and contrary to the company's safety policy.

In early 1999, Mr. Niedzielski brought a safety concern to Mr. Phifer. He believed the class wasn't ready to take the examination, but he didn't specify the cause. Mr. Phifer tried to get more information and advised him about the process available to address his concern. On March 19, 1999, Mr. Niedzielski actually filed a complaint. Mr. Phifer and Ms. Pines investigated the complaint to determine whether the resources that had been assigned for development of the 1999 examination met NRC quality standards and whether Mr. Niedzielski had been subjected to harassment. Mr. Phifer addressed the resource issue and Ms. Pines handled the claim of discrimination. Eventually, the investigation failed to substantiate Mr. Niedzielski's complaint. In particular, all the NRC milestones for the examination had been met and the NRC feedback indicated the examination was acceptable with portions of high quality.

[Page 20]

Even though exam preparation is an NRC regulated activity, Mr. Phifer doesn't believe it has any impact on the safety of the public or plant workers. Mr. Phifer did acknowledge that an incompetent nuclear plant operator would raise a nuclear safety concern, but he didn't believe a test could be administered that would permit an incompetent operator to become licensed because the NRC audits the examination to ensure a good test.

Ms. Faye Pines (TR, pages 399 to 420)

Ms. Pines is a BG&E senior human resource consultant. On March 25, 1999, Mr. Phifer contacted her about Mr. Niedzielski's alleged safety concern. First, she spoke with Mr. Niedzielski about his perceived adverse job actions, consisting of a corrective action and performance proficiency report. Then, Ms. Pines interviewed Mr. Charles Zapp. Upon completion of her investigation, Ms. Pines concluded that Mr. Zapp's use of the

corrective action was proper. Because Mr. Niedzielski did not meet expectations by failing to complete the test development within a specified time, the corrective action was used as a coaching and counseling tool. The performance report rating was also appropriate because it evaluated critical aspects of Mr. Niedzielski's performance including project management. In addition, a supervisor may consider corrective actions administered during the evaluation period. Eventually, Ms. Pines signed with Mr. Phifer a nuclear performance assessment report (RX 1).

In her investigation of whether the performance evaluation ratings were proper, Ms. Pines was not aware of the NRC's assessment of the final examination product. She also doesn't know why the performance report was not administered in January 1999, rather than March 1999.

Mr. Charles C. Zapp (TR, pages 424 to 484)

Mr. Zapp presently works as a human performance evaluator for BG&E. He has known Mr. Niedzielski for 20 years and last supervised him between 1996 and 1999. Off duty, he had a casual friendship with Mr. Niedzielski and his family. Based on Mr. Niedzielski's request, Mr. Zapp attempted to give him flexible hours so he could deal with his personal issues.

In the later part of 1997, Mr. Zapp supervised Mr. Niedzielski while Mr. Niedzielski was the Supervisor of the Initial licensing training unit. Due to ineffective supervisor performance, which Mr. Zapp believed caused by stress levels, Mr. Niedzielski was relieved of supervisory duties. Mr. Zapp made an effort to find Mr. Niedzielski a job with equal pay elsewhere in the plant, but no positions were available. Instead, Mr. Niedzielski became a senior operations instructor whose primary focus was development of the upcoming licensing examination, effective January 1, 1998. The initial intention of the assignment was that Mr. Niedzielski would develop the entire examination, starting in April 1998, with a scheduled completion in November 1998. In April 1998, Mr. Niedzielski gave Mr. Zapp a project schedule with numerous milestones. Mr. Niedzielski was also assigned other tasks including instructor qualification.

[Page 21]

Mr. Zapp did not formally monitor Mr. Niedzielski's development of the exam. Mr. Niedzielski did submit an exam outline in the beginning of June 1998 for review, which Mr. Zapp completed a month later. During the preparation of the November 1997 exam, they had experienced problems with meeting milestones. So, Mr. Zapp believed there was an understanding between himself and Mr. Niedzielski about the problems associated with development running out to the end. Due to his perceived understanding, he just relied on Mr. Niedzielski's responses to status inquiries that everything was on track.

When Mr. Niedzielski asked for leave during the summer of 1998, Mr. Zapp was never led to believe that meeting milestones would be a problem. In the end of September 1998,

Mr. Niedzielski reported to Mr. Zapp that the 25 questions he had anticipated using were no longer eligible. At that time, Mr. Niedzielski indicated he did not have sufficient time to prepare the January 1999 examination and informed Mr. Zapp that nothing on any of the three portions of the examination had been completed. Mr. Zapp was surprised by Mr. Niedzielski's news about the 25 questions for two reasons. First, Mr. Niedzielski had been a party in an April 1998 conversation with Mr. Hornick and Mr. Zapp about using the retake exam, containing the 25 questions, as an audit exam. Second, prior to September 1998, Mr. Niedzielski had never complained about insufficient resources. Following that exchange, Mr. Niedzielski and Mr. Zapp met with Mr. Zapp's supervisor in October 1998 to determine whether the test development could be accomplished on time. They concluded sufficient time still remained and Mr. Zapp required the submission of formal weekly status reports.

On October 8, 1998, Mr. Zapp presented a corrective action report to Mr. Niedzielski. According to Mr. Zapp, Mr. Niedzielski had wasted time because by the 10th month of the year, nothing had been completed. He couldn't understand how Mr. Niedzielski got to September 1998 without anything completed. Mr. Niedzielski told Mr. Zapp he felt the action was unwarranted because he had been working on several items. Mr. Zapp also asked Mr. Birney for help from one of his instructors to prepare the simulator and job performance measures portions of the examination. That individual accomplished both tasks and Mr. Niedzielski prepared the written test. Mr. Zapp and Mr. Birney worked unpaid overtime in the evening to review the questions.

In a December 1998 informal discussion with Mr. Zapp, Mr. Niedzielski first raised his nuclear safety concern. Because he had to work overtime to finish the development of the written exam, a regulated activity, Mr. Niedzielski believed the quality of the examination might be affected. Mr. Zapp agreed that concentrated overtime had been necessary, but he did not see that as a safety concern because the NRC would ultimately decide if the examination met its requirements for determining whether individuals were qualified for licensing. At the same time, Mr. Zapp also indicated Mr. Niedzielski should use the company process for filing his nuclear safety concern. Mr. Zapp was not angry about Mr. Niedzielski's concern.

Mr. Niedzielski's annual performance report was due in January 1999. However, even though he had completed all the performance comments in January 1999, Mr. Zapp received permission to extend the due date to the end of February 1999. Mr. Niedzielski was busy with the NRC license examination process in January 1999. In addition, since Mr. Niedzielski was interacting with the NRC, Mr. Zapp believed it was better to complete the licensing examination before dealing with the proficiency review to preclude any negative effects from Mr. Niedzielski's potential reaction to the rating.

[Page 22]

In the March 1999 performance report, covering the period January 1998 through January 1999 (RX 7), Mr. Zapp did not give Mr. Niedzielski the top rating in technical

knowledge, program administration, and communications because Mr. Niedzielski waited till the end to prepare the test and he didn't present an accurate assessment of his progress to Mr. Zapp prior to the end of September 1998. Even though the NRC found the examination satisfactory and gave it some favorable comments, Mr. Zapp did not give Mr. Niedzielski an overall top rating of 5, meaning full proficiency, because the examination should have been developed throughout the year rather than at the end of the year and the final results were due in part to the extra effort by several employees. Mr. Zapp noted that Mr. Niedzielski's overall proficiency level at the beginning of the reporting period was level 4. So, when Mr. Niedzielski received an overall 4 at the end of the reporting period, there was no change in proficiency level. On the other hand, while Mr. Niedzielski started the reporting period at pay level 5, his pay dropped to level 4 at the end of the reporting period since that was his final overall proficiency rating.

Mr. Niedzielski was surprised by, and disagreed with, Mr. Zapp's performance assessment. Mr. Zapp acknowledged that after the October 1998 warning, Mr. Niedzielski had produced a satisfactory written exam. However, he based the performance appraisal on Mr. Niedzielski's work throughout the year.

Neither the October 1998 corrective action nor the March 1999 evaluation were caused by Mr. Niedzielski raising a nuclear safety concern.

Mr. Zapp agrees that BG&E had a duty to prepare an adequate licensing examination and that competent, rather than incompetent, operators facilitate nuclear safety.

For 1998, Mr. Zapp received a rating of 5 as a supervisor. His supervisor during that period of time was Ms. Winters, whose supervisor was Mr. James Lemons. Mr. Zapp rated three other employees for 1998; they all received an overall rating of 5.

Mr. William Birney (TR, pages 488 to 496)

Mr. Birney is the BG&E Supervisor of the re-qualification training unit. In September 1998, he started helping Mr. Niedzielski develop simulator scenarios. Mr. Birney was under the impression that the scenarios were already partially developed. However, he discovered nothing had been done. He reported the situation to Mr. Hornick and Mr. Zapp. They concluded there was insufficient time for Mr. Niedzielski to complete everything. Consequently, the simulator development was assigned to a person in Mr. Birney's unit.

Mr. Birney reviewed all of the written examination questions. About 60% of the questions needed additional work. Mr. Birney, Mr. Zapp and Mr. Niedzielski refined those questions. Mr. Birney accomplished the review and work on the questions during unpaid overtime. In addition, Mr. Birney had to fill in for the person in his unit that was doing the simulator portion of the examination.

Mr. Birney has been involved in examination development both as an instructor and supervisor. From his perspective, Mr. Niedzielski had sufficient time to complete the written exam and the simulator scenarios.

A supervisor should not wait a long time to check on the work of an unfamiliar employee. On the other hand, if the supervisor has experience with the employee, then it's reasonable for the supervisor not to check up on the employee.

Norman L. Millis (TR, pages 497 to 508)

Prior to June 1998, Mr. Millis was the general supervisor of nuclear training. From January 1997 to January 1998, Mr. Niedzielski was under his general supervision. Mr. Niedzielski experienced difficulty in the oversight and direction of his employees. Mr. Millis brought in Dr. Mosko for assistance. Dr. Mosko interviewed the members of Mr. Niedzielski's unit. Dr. Mosko advised that Mr. Niedzielski was a technical person who gravitated to the work rather than providing guidance to his employees. In light of this information and the workload, Mr. Millis attempted to find other positions with equivalent pay for Mr. Niedzielski that did not involve supervision. So, they decided to have Mr. Niedzielski concentrate on the examination development as a senior operations instructor. Since a single contractor had prepared the previous exam and because Mr. Niedzielski had been involved in the exam creation process, Mr. Millis believed he had sufficient resources to develop the NRC examination.

Mr. Millis is not aware whether more than one individual worked on the examination for the contractor. But, in Mr. Millis' opinion, Mr. Niedzielski could have completed the entire examination.

Ms. Nancy Winters (TR, pages 509 to 553)

Ms. Winters became the general supervisor for the Nuclear Training Section on June 1, 1998. As a general supervisor, Ms. Winters supervised Mr. Zapp and was familiar with Mr. Niedzielski's assigned duties and responsibilities. Concerning his available resources for preparation for exam development, Mr. Niedzielski had prior experience with the exam; the company sent him to two workshops; and, as his biggest resource, Mr. Niedzielski was given time to accomplish the development as his primary responsibility. Mr. Niedzielski did not effectively use those resources during 1998. Specifically, they discovered that in September 1998, Mr. Niedzielski had not written any questions for the examination. She expected Mr. Niedzielski to have prepared an examination that would be acceptable to the NRC within established time frames to meet the December 21, 1998 NRC deadline.

A corrective action is used to inform an employee in a documented form that expectations are not being met. In September 1998, Mr. Zapp spoke with Ms. Winters and was upset that Mr. Niedzielski had not developed any examination questions. Later, she had a conversation with both Mr. Zapp and Mr. Niedzielski and pointed out that Mr. Niedzielski was responsible for preparing the test. Then, she discussed with Mr. Zapp the

importance of documenting the performance issue. Mr. Niedzielski received a corrective action because he was not meeting time table expectations and the work was not being accomplished. Ms. Winters reviewed the corrective action before it was presented to Mr. Niedzielski. At the time of the corrective action, Mr. Niedzielski had not yet mentioned his concern about nuclear safety. Mr. Niedzielski improved after the corrective action by completing the agreed-to number of exam questions each day.

[Page 24]

Although Ms. Winters discussed with Mr. Zapp supervisory oversight issues, he did not receive a corrective action.

A job proficiency evaluation is used to manage long-term performance and provides feedback on the extent of an employee's proficiency. Ms. Winters reviewed, and agreed with, Mr. Niedzielski's proficiency evaluation for 1998. She believed the yearly assessment was appropriate because work had not been done throughout the evaluation year. In particular, due to the late submission of the questions, there was not sufficient time to return the questions that needed additional work to Mr. Niedzielski. Instead, other employees had to make the necessary modifications. The performance report was not retaliation for his nuclear safety report. It was based on his lack of performance. Ms. Winters concurred with delaying Mr. Niedzielski's receipt of his performance report. He did not receive the report when it was accomplished due to concern about his reaction to it and the need for him to be focused during the NRC examination.

On January 6, 1999, Mr. Niedzielski told Ms. Winters he had a nuclear safety concern. Mr. Niedzielski reported that a contractor instructor had demonstrated inappropriate behavior by raising his voice at students in a simulator. Ms. Winters didn't see the incident as a safety concern. Then, Mr. Niedzielski discussed his view that there were not sufficient resources to write the exam. He also characterized a nuclear safety concern in terms of a regulated activity. Ms. Winters disagreed. He also mentioned communications problems with Mr. Zapp. Since Ms. Winters had heard from Mr. Zapp that Mr. Niedzielski was looking for other positions in the company, she asked him whether he had considered looking for a different position. Ms. Winters did not tell Mr. Niedzielski to look for a lower paying job in Baltimore. She believes Mr. Niedzielski may have referenced another job in Baltimore. Mr. Niedzielski indicated he still had a nuclear safety concern. So, Ms. Winters encouraged him to use the reporting channels within the company.

In January or February of 1999, the company decided to increase the number of instructors in the re-qualification and the initial training units with experienced senior operators. However, because senior operators earned premiums for shift work, they were reluctant to become instructors. In an effort to obtain a sufficient number of instructors without penalizing the senior operators, they raised the senior operator pay grade from level 78 to level 79. At the same time, the number of operations training supervisors was reduced from four to two and Mr. Zapp moved from his supervisor position. Shortly after

the April 1, 1999 effective date of the reorganization, Ms. Winters realized that Mr. Niedzielski was affected by the pay level change. Because Mr. Niedzielski had not been earning premium pay as a plant operator, Ms. Winters decided to create a pay grade 78 exam developer position reporting to Mr. Evans, which would place Mr. Niedzielski at the same grade level prior to the reorganization. As a result, Mr. Niedzielski became responsible for writing the September 2000 NRC examination. He has the same resources that were available for preparation of the 1999 test. Mr. Niedzielski has been under close supervision and has completed all the written questions.

[Page 25]

In June 1998, Mr. Niedzielski's monthly income was about \$5362. Then, due to his March 1999 job proficiency report, Mr. Niedzielski's salary dropped by 5%. Then, due to the April 1999 reorganization, his salary increased 5% when he was moved to pay level 79 based on his senior operator status. After Ms. Winters realized Mr. Niedzielski would not be going back to plant operations and he was placed in the exam developer position, his pay grade came back to level 78. However, they did not take away the additional 5%. In fact, his salary is currently equal to a proficiency of 4 at pay level 79, which is \$266 per month higher than proficiency 5 at pay level 78.

Mr. James R. Lemons (TR, pages 554 to 567)

Mr. Lemons is currently the manager of nuclear support services and has known Mr. Niedzielski for a number of years. In January 1998, Mr. Niedzielski was removed from his supervisory position due to concerns about effectiveness of communication and because the company was not getting expected results. Dr. Mosko verified Mr. Niedzielski's communication and leadership problems. Mr. Zapp participated in discussions about the problem. In addition to his worries about the effectiveness of the organization, Mr. Zapp expressed concern for Mr. Niedzielski as a friend and individual.

In the summer of 1998, Mr. Lemons was aware that Mr. Niedzielski was experiencing personal problems that were distracting him from his job performance. They attempted to accommodate Mr. Niedzielski by being flexible with work hours.

After Mr. Niedzielski expressed his nuclear safety concern to Mr. Lemons in March 1999, Mr. Lemons reviewed Mr. Niedzielski's prepared documents. To investigate, he spoke with operations supervisors who stated their personnel were receiving quality instruction and had the ability to pass the examination. Accordingly, Mr. Lemons did not find any safety issue.

Mr. Lemons believes the corrective action for Mr. Niedzielski was appropriate since Mr. Niedzielski's performance had been unsatisfactory. The March 1999 performance report was also appropriate because Mr. Niedzielski's performance "was clearly not up to the overall expectations for a level five proficiency performance" (TR, page 563). Even though the exam results were successful, the company had to take action late in the

process because Mr. Niedzielski had not done a fully satisfactory job in the preceding months.

There was no discrimination or retaliation due to his report of a nuclear safety problem. Not only are those actions illegal, they are contrary to good management of a nuclear power plant. All the actions were based on Mr. Niedzielski's performance.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Preliminary Findings

According to 42 U.S.C. §5851 (b) (1) and 29 C.F.R. §24.3 (b) (2), an employee may file a discrimination complaint under the employee protection provisions of the ERA within 180 days of the alleged violation. Mr. Niedzielski alleges two violations of the Act. First, Mr. Niedzielski's supervisor did not give him top ratings in the March 1999 job performance rating, which effectively imposed a 5% reduction in his monthly salary, starting March 1, 1999. Mr. Zapp finalized the appraisal on March 3, 1999 when he decided not to alter the ratings on the job performance evaluation (CX 8). Second, Ms. Winters, a general supervisor, in April 1999, reorganized the training

[Page 26]

section which caused Mr. Niedzielski's job position to drop one pay grade. Based on the earliest date of the alleged violations, March 1, 1999, the 180 day complaint filing window closed on August 28, 1999. Since Mr. Niedzielski, through counsel filed his discrimination complaint on August 27, 1999, I find the complaint timely.⁷

The regulation implementing the Act, 29 C.F.R. Part 24, also requires a complainant to file a request for hearing with the Chief Administrative Law Judge within five business days of an adverse preliminary decision by OSHA concerning his or her complaint. *See* 29 C.F.R. §24.4 (d) (2). In Mr. Niedzielski's case, the adverse determination letter is dated November 17, 1999. The Office of Administrative Law Judges ("OALJ") received its copy of the letter on November 19, 1999. Although Mr. Niedzielski states he received the notification letter "approximately" November 17, 1999 (TR, page 51), I do not believe he received it the same day OSHA issued the letter. Consequently, I will use November 19, 1999 as the day of his receipt.

Mr. Niedzielski also states he faxed his appeal of the adverse determination to OALJ "around the 24th" (TR, page 51). However, the record does not contain any such fax. Instead, the OALJ file contains Mr. Niedzielski's letter of appeal, dated November 26, 1999, which was received by OALJ on November 29, 1999 through U.S. Postal Service express mail. November 25, 1999 was a federal holiday (Thanksgiving) and November 20, 21, 27 and 28, 1999 were weekend dates. Based on his receipt of the notification letter on November 19, 1999, and not counting the holiday and weekends, Mr. Niedzielski had until November 29, 1999 to present his request for a hearing to OALJ.

Since OALJ received his appeal on November 29, 1999, I find his request for a hearing timely.

Specific Findings

August 1994 to January 1998. Mr. Zapp completes three performance appraisals for Mr. Niedzielski. Mr. Niedzielski receives the top rating of 5 in every critical area and for his overall performance rating.

1996. The NRC begins to turn over to nuclear plant licensees the responsibility for developing the three part licensing examination.

1997. Within the BG&E Initial Training Unit some communication conflicts developed between the unit employees and their supervisor, Mr. Niedzielski.

[Page 27]

During the fall, Mr. Niedzielski observed a contractor's effort to develop the NRC licensing examination scheduled for November 1997.

November 1997. BG&E administers a contractor-prepared licensing examination with mixed results.

Mr. Zapp informs Mr. Niedzielski, then Supervisor of the Initial Training Unit, that due to declining effectiveness as a supervisor, Mr. Niedzielski will be reassigned.

December 8, 1997. Mr. Niedzielski requests an immediate reassignment of duties to reduce his supervisory responsibilities due to family concerns and an increasing workload.

January 1998. Mr. Niedzielski is transferred from his supervisor position to become a senior operations instructor. His primary responsibility is the development of the three part NRC licensing examination to be administered in January 1999.

Spring, 1998. Mr. Niedzielski attends an NRC examination preparation workshop. At the workshop, the man-hour estimates for the project range from 400 to 1000. Upon his return, Mr. Niedzielski works on an examination development schedule and a man-hour estimate. In addition, he completed other assignments.

April to September 1998. In response to Mr. Zapp's occasional inquiries on the status of exam development, Mr. Niedzielski indicates satisfactory progress.

May 5, 1998. Mr. Niedzielski gives Mr. Zapp his examination development schedule with an estimate that about 800 man-hours will be required for exam development,

beginning six months prior to the administration of the test. The task will require one, with the maximum of two, person(s).

Mid-June 1998. Mr. Zapp agrees with most of the examination development recommendations. Mr. Niedzielski presents Mr. Zapp with an exam outline which includes 25 questions from a previous examination. Mr. Zapp completes his review a month later.

July to September 1998. Mr. Niedzielski works an average of 15 hours per week on the examination development.

July 6, 1998. Mr. Zapp and Mr. Niedzielski sign a 1998 Result Incentive Plan which describes the criteria for success in development of the licensing examination is meeting NRC requirements.

July 22, 1998. Mr. Zapp completes a semi-annual review of Mr. Niedzielski's performance, noting Mr. Niedzielski's substantial effort in becoming an exam development expert. Mr. Zapp also compliments Mr. Niedzielski on his use of milestones and his communication of his resource needs for exam development.

August 1998. The NRC sets a firm date for administration of the licensing examination in January 1999.

[Page 28]

Early-September 1998. Mr. Niedzielski contacts other utility companies and discovers that his man-hour estimate may need to be significantly increased.

September 22, 1998. Mr. Niedzielski outlines to Mr. Zapp the results of his bench marking with other utility companies. He concludes development of the licensing examination requires three individuals assigned to each of the three parts of the exam and another person coordinating the effort. He expresses his concern about resources for the examination development and insufficient time for the completion of the project. Mr. Niedzielski also asserts a development team needs to be in place 90 days prior to the exam. Mr. J. Lemon complimented Mr. Niedzielski on his bench marking efforts.

September 30, 1998. Mr. Niedzielski discovers that the 25 pre-written questions that he planned to use as part of the 125 question submission for the January 1999 examination are no longer available.

October 5, 1998. Mr. Zapp requests a formal progress report from Mr. Niedzielski. Due to the loss of the 25 questions, Mr. Niedzielski indicates in the report that no questions had yet been prepared for the examination. Mr. Zapp becomes upset with the "zero" response and finds a performance problem. He also states Mr. Zapp has not provided accurate status reports.

Mr. Zapp expresses his concern about the examination development to Ms. Winters. She indicates the importance of documenting the performance issue. Eventually, Ms. Winters reviews the proposed corrective action.

October 8, 1998. Mr. Zapp gives Mr. Niedzielski a formal warning, through a written corrective action, that he has failed to meet expectations. Mr. Zapp notes that even though Mr. Niedzielski started the test development at the beginning of 1998, he had accomplished very little. Due to Mr. Niedzielski's lack of performance, Mr. Zapp would have to assign additional employees to complete the examination development.

Mr. Niedzielski replies that the corrective action is unwarranted. He attributed the problem to ineffective communication and insufficient resources. Based on his contact with other utility companies, Mr. Niedzielski believed a team approach to examination development was necessary.

Mr. Zapp responds by acknowledging communication problems. However, he expresses frustration with the discovery in October 1998 about the lack of progress.

Mid-October 1998. Mr. Zapp assigns the simulator scenario and the operation walkthrough portions of the examination to other employees. He directs Mr. Niedzielski to focus on the written portion of the exam.

[Page 29]

December 14, 1998. The written portion of the examination is submitted to the NRC.

December 21 and 22, 1998. The simulator and operations walk-through portions of the examination are delivered to the NRC and meet the submission deadline.

Mr. Niedzielski requests overtime compensation. On the next day, Mr. Zapp asks for additional information but expresses his concern with the request noting the other employees had to work full time and then work on the exam on their own time because the exam project had not been accomplished well.

January 4, 1999.⁸ Mr. Niedzielski expresses to Mr. Phifer his concern about resource management for the NRC exam development and asks whether it is a nuclear safety concern. Mr. Niedzielski believes Mr. Phifer concurs that it might be a nuclear safety issue. Mr. Niedzielski recalls the negative reaction from applicants who failed the November 1997 examination.

January 6, 1999, 8:04 a.m. Mr. Niedzielski responds to Mr. Zapp's December 22, 1998 request for additional information concerning the overtime request and claims 54 hours of overtime in December 1998. He also informs Mr. Zapp about his nuclear safety concern. Mr. Zapp doesn't believe the issue involves nuclear safety but he encourages Mr. Niedzielski to proceed with his concern.

Mr. Niedzielski meets with Ms. Winters and discusses his nuclear safety concern. He explains that the insufficient exam development resources are a safety concern because the NRC regulates the activity. Ms. Winters disagrees and states it is a performance problem. Mr. Niedzielski also describes his communication problems with Mr. Zapp. Based on her understanding that Mr. Niedzielski may be looking for some other work in the plant, Ms. Winters inquires whether Mr. Niedzielski is seeking another job. Mr. Niedzielski hears that exchange as a threat.⁹ Ms. Winters tells Mr. Niedzielski to continue with the nuclear safety complaint process.

January 7, 1999. Mr. Zapp denies Mr. Niedzielski's request for overtime compensation because Mr. Niedzielski's poor planning caused the expenditure of the additional time.

January 19, 1999. On the Results Incentive Plan for 1998, Mr. Zapp gives Mr. Niedzielski a 1.5% out of a possible 3.0% rating for examination development.

January 22 and 25, 1999. The NRC examination is administered.

Mr. Niedzielski also agrees to Mr. Zapp's proposal to delay submission of the January 1999 performance appraisal due to the administration of the NRC examination. Mr. Zapp believes the delay will help preclude any negative effects from Mr. Niedzielski's receipt of the appraisal during the administration of the examination.

[Page 30]

January to February 1999. Due to difficulties in attracting senior operators as instructors, BG&E increases the senior operator pay level to 79. Initially, Mr. Niedzielski, as a senior operator is affected by the pay level change. However, eventually, Ms. Winters reduces his pay level to 78, but his salary remains frozen at the higher level. Ms. Winters also reorganizes the training unit by reducing the number of supervisors.

January 31, 1999. Mr. Niedzielski reports that since June 1998, he has expended 731.5 hours on examination development.

February 25, 1999. Noting its role as the oversight, validation, and approval authority for the licensing examination, the NRC reports that the overall quality of the BG&E's submission for the January 1999 licensing examination was satisfactory. All applicants passed the exam and the written and simulator portions of the test were graded as high quality. The NRC concluded BG&E complied the NRC licensing regulation.

March 3, 1999. After considering Mr. Niedzielski's comment to the 1998 performance appraisal, Mr. Zapp completes the evaluation without any changes in the overall proficiency level. Ms. Winters also reviews, and concurs with, the evaluation. The rated proficiency level of 4 effectively reduced Mr. Niedzielski's pay by 5%. While acknowledging Mr. Niedzielski's job knowledge, Mr. Zapp believed Mr. Niedzielski did

not meet expectations. He observed that as of September 1998 Mr. Niedzielski had developed very little of the examination. As a result, other employees had to work overtime to complete the examination project. In addition, Mr. Zapp believes Mr. Niedzielski did not provide accurate progress reports. Mr. Zapp recommends Mr. Niedzielski develop examinations according to agreed-to schedules and that he keep supervisors informed of his progress. Mr. Niedzielski is surprised by the evaluation and expresses his disagreement with the ratings. Mr. Zapp also rates three other employees for 1998 and gives them overall ratings of 5. Mr. Zapp's rating as a supervisor for 1998 is also a 5.

March 8, 1999. Mr. Lemons reviews the March 3, 1999 performance report without comment.

March 19, 1999. Mr. Niedzielski submits a formal nuclear safety complaint, alleging ineffective resources were applied to the development of the January 1999 NRC licensing examination. He became aware in June 1998 that one person working on the test was insufficient. Management didn't agree and considered the resource issue a performance problem. He specifically notes Mr. Zapp's decision in early October 1998 not to provide any additional manpower for the exam development. Mr. Niedzielski states he verbally raised the nuclear safety concern on January 6, 1999. Finally, Mr. Niedzielski states he has suffered discrimination since raising the safety concern.

March 22, 1999. Mr. Niedzielski meets with Ms. Winters, Mr. Zapp, and Mr. Mosko to discuss his concern. Ms. Winters still finds a performance problem.

March 25, 1999. Mr. Phifer and Ms. Pines meet to discuss Mr. Niedzielski's nuclear safety complaint. Mr. Phifer will investigate the resource issue and Ms. Pines will consider the harassment portion of the complaint. Eventually, neither individual substantiates Mr. Niedzielski's complaint.

[Page 31]

April 21, 1999. A job summary for the position, NRC License Exam Developer, with a pay grade of 78 is developed.

Near the end of April 1999. Ms. Winters informs Mr. Niedzielski that she is reorganizing the Operations Training Unit, moving Mr. Zapp to another job, and assigning Mr. Niedzielski to Mr. Evans as an exam writer at pay level 78.

April/May 1999. Mr. Niedzielski provides his chronology of events to Mr. Phifer to support his complaint.

June 6, 1999. Mr. Zapp rates Mr. Niedzielski for the period March 1999 to May 1999 as an overall 4. He encouraged Mr. Niedzielski to use milestones and to keep supervisors informed when time commitments can not be met.

July 27, 1999. Mr. Phifer issues the report on Mr. Niedzielski's nuclear safety concern. Finding additional personnel were brought in to complete the examination, which the NRC found satisfactory, he concludes sufficient resources were applied to the development of the January 1999 examination. Mr. Phifer found a lack of compelling evidence that the personnel actions were inappropriate.

August 27, 1999. Due to Mr. Lemons' approval of the March 1999 performance by Mr. Zapp, Mr. Niedzielski files his discrimination complaint with the United States Department of Labor.

September 30, 1999. BG&E, through its counsel, expresses its policy to treat any complaint concerning an NRC regulated activity, such as examination development, as a nuclear safety concern.

September to December 1999. Over the combined course of 16 workdays, Mr. Niedzielski develops 125 questions for the September 2000 examination.

December 1999. Mr. Niedzielski receives an overall 4 performance rating from Mr. Evans.

Elements and Burden of Proof¹⁰

Prima Facie Case

In an ERA whistle blower case the complainant has an initial burden of proof to make a *prima facie* case by showing (1) the complainant engaged in a protected activity; (2) the respondent knew the employee engaged in the protected activity; (3) the complainant suffered an unfavorable personnel action; and, (4) circumstances are sufficient to raise the inference that the protected activity was likely a contributing factor in the unfavorable action. 29 C.F.R. §24.5 (b) (2) (i) to (iv) and *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996).

[Page 32]

Respondent's Burden to Produce Evidence

If the complainant presents a *prima facie* case showing that protected activity was likely a contributing factor in the unfavorable personnel action (an illegitimate motive caused the personnel action), the respondent then has an opportunity to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the protected activity. 29 C.F.R. §24.5 (c) (1). In other words, the respondent may avoid liability due to the establishment of a *prima facie* case by producing sufficient evidence that clearly and convincingly shows a legitimate purpose or motive for the personnel action. *See Yule v. Burns International Security Service*, 93-ERA-12 (Sec'y May 24, 1995). Although there is no precise definition of "clear and

convincing," that evidentiary standard falls between preponderance of the evidence and beyond a reasonable doubt. *Yule* at page 4.

Complainant's Ultimate Burden of Persuasion

If the respondent successfully produces clear and convincing evidence, a legitimate motive for the personnel action, then the focus returns to the complainant's ultimate burden of proof to demonstrate that the respondent's stated legitimate reason is pretext. In reviewing the numerous cases on the shifting burden of production and the ultimate burden of proof, the United States Court of Appeals for the Eight Circuit in *Carroll v. USDOL*, 78 F. 3d 352, 356 (8th Cir. 1996) (case below *Carroll v. Bechtel Power Corp.*, 91-ERA 46 (Sec'y February 15, 1995)) observed:

But once the employer meets this burden of production, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981) (applying *McDonnell Douglas* test) (footnote omitted); see also *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993) (applying *McDonnell Douglas* test). The *Couty/McDonnell Douglas* framework and its attendant burdens and presumptions cease to be relevant at that point, *Hicks*, 113 S. Ct. at 2749, and the onus is once again on the complainant to prove that the proffered legitimate reason is a mere pretext rather than the true reason for the challenged employment action. *Burdine*, 450 U.S. at 256. While *Couty* allows the complainant to shift the burden of production to the employer by establishing a prima facie case, the ultimate burden of persuasion remains with the complainant at all times. *Hicks*, 113 S. Ct. at 2747; *Burdine*, 450 U.S. at 253.¹¹

At this point of the analysis, the fact the complainant had established a *prima facie* case becomes irrelevant. Instead, the trier of fact must determine the ultimate issue, whether the complainant has proven by a preponderance of the evidence that the respondent retaliated against him or her for engaging in a protected activity. *Carroll* at 356.

[Page 33]

Issue # 1 - Protected Activity

As mentioned above, the first requisite element for a *prima facie* case is a protected activity. The Secretary, U.S. Department of Labor, has broadly defined a protected activity as a report of an act which the complainant reasonably believes is a violation of the environmental acts. While it doesn't matter whether the allegation is ultimately substantiated, the complaint must be "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Minard v. Nerco Delamar Co.*, 92-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8. The act must implicate safety definitively and

specifically. *American Nuclear Resources v. U.S. Dept. of Labor*, 143 F.3d 1292 (6th Cir. 1998), citing *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926 (11th Cir. 1995). In other words, the standard involves an objective assessment. The subjective belief of the complainant is not sufficient. *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB Apr. 8, 1997). In the *Minard* case, the Secretary indicated the complainant must have reasonable belief that the substance is hazardous and regulated under an environmental law. Consequently, the complainant's concern must at least "touch on" the environment. *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and, *Dodd v. Polysar Latex*, 88-SWD-4 (Sec'y Sept. 22, 1994).

Internal complaints made to company supervisors concerning safety and quality control are protected activities under the Act. *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34 (Sec'y Sept. 28, 1993).¹² The form of the complaint is not critical and even an informal complaint to a supervisor may be sufficient to establish a protected activity. *Samodurov v. General Physic Corp.*, 89-ERA-20 (Sec'y Nov. 16, 1993).

In resolving this issue, I have also considered the stated purpose of the Act, to encourage the reporting of matters involving or relating to nuclear safety. Consequently, the Act must be read broadly because "[a] narrow hyper technical reading" of the employee protection provision of the Act would do little to effect the statute's aim of protecting employees who raised nuclear safety concerns. *Kansas Gas & Electric Company*, 780 F.2d 1505 (10th Cir. 1985), cert. denied 478 U.S. 1011 (1986). The Act has a "broad, remedial purpose for protecting workers from retaliation based on their concerns for safety and quality." *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984). Courts and the Secretary of Labor have broadly construed the range of employee conduct which is protected by the employee protection provisions contained in environmental and nuclear acts. See S. Kohn, *The Whistleblower Litigation Handbook*, pp. 35-47 (1990).

Mr. Niedzielski asserts he engaged in a protected activity by complaining to his supervisors and Mr. Phifer about his concern that insufficient and ineffective resources had been provided for development of the January 1999 NRC examination. The failure of BG&E to take a team approach to the examination development raised a nuclear safety issue, or had a potential adverse effect on nuclear safety, for two reasons. First, examination development is regulated by the NRC, which indicates its importance to public safety. Because Mr. Zapp decided not to provide the man-hours and resources Mr. Niedzielski deemed necessary due to his bench marking with other companies, BG&E failed to fully comply with its regulated duty to conduct a quality development of the NRC examination. Second, based on his experience from the reactions of applicants who failed the November 1997 examination, Mr. Niedzielski believed a poorly crafted examination which causes applicants to fail, produces negative feelings among power plant employees. And, such hostile feelings do not enhance safety within a nuclear power plant.

The respondent maintains Mr. Niedzielski's reports of insufficient resources were not legitimate safety complaints, and consequently, not protected activity. The NRC evaluation that the quality of the January 1999 examination was good and some sections were of "high quality" clearly demonstrates that, contrary to Mr. Niedzielski's assertion, BG&E applied sufficient resources in 1998 to the development of the January 1999 examination. Likewise, the fact all the applicants passed the examination and were successfully licensed by the NRC further impeaches the validity of Mr. Niedzielski's concern. Finally, as noted by several supervisors, the NRC had to review and approve the submitted examination. In that position, the NRC would prevent any insufficiently prepared examination from being administered. As a result, there was little potential that a poor examination would adversely affect nuclear safety.

Given the mandate to liberally construe the definition of protected activity, I consider the resolution of this issue a very close call. At the same time, I note that the definition of protected activity has two elements. First, the complainant's belief must be factually reasonable. Second, he or she must reasonably believe the action violates an environmental statute. Within these regulatory parameters, I conclude Mr. Niedzielski's resource and nuclear safety complaints to his supervisors in January 1999 and to Mr. Phifer in March 1999 were not protected activities.

January 1999 Complaint

When Mr. Niedzielski expressed in January 1999 to Mr. Zapp, Ms. Winters, and Mr. Phifer, that insufficient examination development resources might pose a nuclear safety concern, the NRC's evaluation of the BG&E examination was not yet published. Within that context, based on his bench-marking with other utilities, Mr. Niedzielski's belief that not enough man-hours had been expended to produce a quality examination was not factually unreasonable. Even though later that conclusion was not substantiated, at the time he raised his concern in January 1999, there was a reasonable factual basis for his belief that BG&E had not applied sufficient resources.

However, despite the reasonableness of his concern about resources, I do not believe his complaint was a protected activity because the nexus between insufficient examination development efforts and adverse nuclear safety consequences is too nebulous. As a starting point for my finding, I note that through December 1998, even Mr. Niedzielski, as demonstrated both by his statements and actions,¹³ did not consider that his dispute with Mr. Zapp concerning the resources applied to the exam development had an adverse nuclear safety potential. Throughout 1998, Mr. Niedzielski did not link the man-power deficiency to nuclear safety. Only after he ascertained that examination development was an NRC regulated activity did he begin to pursue his complaint under the rubric of nuclear safety.

Because examination development is a regulated activity, Mr. Niedzielski asserts his report of ineffective allocation of resources, or poor quality development, touches on nuclear safety. At least one company representative agreed with his interpretation. The company's counsel has stated that BG&E treats any issue with an NRC regulated activity as nuclear safety concern (RX9). On the other hand, BG&E instructions concerning its nuclear safety concerns program specifically excludes administrative and management issues unless they have a direct impact on nuclear safety (RX 2).

Under the interpretations by Mr Niedzielski and company representatives, any report of an alleged dereliction associated with any NRC regulated function, regardless of its potential effect on nuclear safety, will be an ERA protected activity. I find this approach too broad an application of the ERA employee protection provisions. In part based on the BG&E instructions about nuclear safety concerns, I consider an activity "protected" under the Act only if it has some direct potential to affect, or connection with, nuclear safety.

From my perspective, the record in this case is insufficient to demonstrate that the NRC regulations concerning examination preparation are directly aimed at the preservation and enhancement of nuclear safety. In addition, although Mr. Niedzielski alleges BG&E's allocation of resources were ineffective in light of the NRC's quality concerns (CX 11), he fails to specify the exact regulatory basis for his conclusion. For example, Mr. Niedzielski has not introduced any NRC regulatory provision that actually mandates the amount of resources a utility must apply to examination development. While I would not require a complainant to name in his complaint an actual regulatory citation, I still must have some grounds upon which to evaluate whether his concern about nuclear safety was objectively reasonable. In the absence of the specific NRC regulatory language on operator testing and licensing, I am unable to determine the exact nature of the NRC's quality concerns about examination development referenced by Mr. Niedzielski in his complaint and whether the regulations address nuclear safety or just focus on the process, timing, and requirements of a licensing examination. There is certainly an appealing implication that all NRC regulations deal with, and impact on, nuclear safety. However, in the absence of any evidence to that effect, I will not make that intuitive jump.

The most significant basis for my decision that Mr. Niedzielski's report of insufficient resources was not reasonably related to a nuclear safety concern is the presence of the NRC in the examination development process. As stated by the NRC, it has oversight responsibility for, and final approval authority over, nuclear operator licensing examinations (RX 6). The NRC's significant role as a quality control gatekeeper prior to the administration of any licensing examination is a strong factor against finding Mr. Niedzielski's concern about development resources definitively and specifically touches on nuclear safety. Because the NRC will evaluate the quality of a licensing examination and require necessary changes,¹⁴ the potential for an adverse impact on nuclear safety due to ineffective application of manpower during a power company's preparation of the examination is greatly diminished.

Rather than affecting nuclear safety, the application of insufficient development resources or ineffective development of an examination could have one of two consequences. First, the utility would not be able to meet the examination deadline. This was the situation facing Mr. Zapp and BG&E in October 1998 upon the discovery that Mr. Niedzielski had not yet written any examination questions. To avoid busting the examination submission deadline, Mr. Zapp assigned other employees examination development tasks, expended numerous hours of overtime, and hand-delivered the last part of the examination to the NRC on the actual due date. The second consequence of failing to produce a quality examination is rejection of the proposed test by the NRC and a delayed administration of the examination until the company produces a satisfactory examination for the NRC. In either scenario, the requirement to obtain NRC approval prevents the administration of an examination that does not sufficiently evaluate the competence of nuclear operator applicants.

[Page 36]

To illustrate how a poorly developed examination may compromise nuclear safety, Mr. Niedzielski points out that applicants who fail to pass the examination may harbor negative feelings.¹⁵ While negative feelings may exist, the inability of some applicants to pass the examination does not indicate that the NRC has permitted a poorly developed examination to be given. The failure rate does not necessarily adversely reflect on the quality of the examination.¹⁶ Instead, the failure of an applicant indicates that individual was not yet ready to become licensed due to a lack of adequate training, sufficient preparation, and possibly competence.

Not only do I find Mr. Niedzielski's resource complaint as it relates to nuclear safety objectively unreasonable for the reasons noted above, I also consider that Mr. Niedzielski's actual experience with NRC licensing examinations precludes even a finding that his expressed nuclear safety concern was subjectively reasonable. Mr. Niedzielski participated in the development and approval process for the November 1997 examination, which included refinement of questions rejected by the NRC upon its initial review of the examination. Then, in the spring of 1998, he attended an NRC examination development workshop. In the fall of 1998, Mr. Niedzielski contacted other utility companies about their efforts to prepare NRC licensing examinations. And, throughout 1998, his job was to develop an examination for submission to the NRC that would pass its scrutiny. Mr. Niedzielski was more than well aware of the critical role the NRC played in ensuring that any licensing examination prepared by a nuclear power company would sufficiently evaluate operator competency to the extent that nuclear safety would not be compromised.

In summary, while Mr. Niedzielski had a reasonable basis for questioning the effectiveness of BG&E's application of exam development resources, I find Mr. Niedzielski's January 1999 complaint as it related to nuclear safety was neither objectively nor subjectively reasonable due to the role of the NRC in the examination

development process. Accordingly, his submission of the January 1999 complaint was not a protected activity.

March 1999 Complaint

Briefly, the March 1999 formal complaint, as it relates to nuclear safety shares the same deficiencies as the January 1999 complaint. Consequently, the March 19, 1999 formal complaint is not a protected activity. In addition, I specifically find that by March 19, 1999, Mr. Niedzielski no longer had a reasonable basis for complaining about the allocation of resources because in Mr. Niedzielski's own words at that time the January 1999 NRC examination turned out to be "picture perfect." On February 25, 1999, the NRC issued its evaluation of the BG&E examination submission (RX 6). The NRC reviewed and validated all portions of the examination. The quality of the initial examination submission was "acceptable" and the written portion of the examination and simulator scenarios were of "high quality." All applicants passed the examination. And, the NRC concluded BG&E was conducting its operator licensing program in accordance with NRC regulations. In light of the February 1999 NRC objective evaluation of the BG&E examination submission, Mr. Niedzielski no longer had a factual basis for asserting in March 1999 that BG&E applied insufficient or ineffective resources to the development of the January 1999 NRC examination.

[Page 37]

Issue # 2- Performance Appraisal and Salary Reduction¹⁷

If Mr. Niedzielski had engaged in a protected activity, he would be able to establish the other three requisite elements for a *prima facie* case of illegitimate motive. First, Mr. Niedzielski's internal complaint to Mr. Zapp and Ms. Winters in January 1999 provided BG&E sufficient notice of his nuclear safety concern. Next, the downgrading of several elements of the March 1999 performance report, in comparison with his previous top notch evaluations, constitutes an adverse action.¹⁸ And, third, based on the temporal proximity between the January 1999 complaint to the March 3, 1999 performance evaluation with its corresponding salary reduction, Mr. Niedzielski is able to raise a reasonable inference that the complaints contributed to his adverse performance appraisal.¹⁹ In light of this *prima facie* case, I next evaluate whether the respondent has produced clear and convincing evidence that Mr. Zapp would have written the same performance appraisal even if Mr. Niedzielski had never submitted his two complaints.

Essential factors in my analysis of Mr. Zapp's motive in this case are the timing of the October 1998 Corrective Action in relation to the complaints, the contents of the corrective action, the contents of the performance report, and the relationship between the two documents. Concerning the timing of the corrective action, Mr. Zapp presented the formal warning about Mr. Niedzielski's performance in preparing the examination on October 8, 1998, several months prior to Mr. Niedzielski's January 1999 complaint asserting a nuclear safety concern. Since the corrective action preceded any mention of

nuclear safety, Mr. Zapp obviously was not influenced in any manner by Mr. Niedzielski's January 1999 nuclear safety concern when he presented the October 1998 corrective action. Based on this timing, I find Mr. Zapp did not use the corrective action to retaliate against Mr. Niedzielski for his nuclear safety concerns.

As set out in the specific findings, the course of events during 1998 indicates that Mr. Niedzielski and Mr. Zapp had different expectations concerning what constituted satisfactory progress during the course of the examination development in 1998. Due to mutual communication problems, both parties were surprised by each others reaction in October 1998, following the disqualification of the 25 questions Mr. Niedzielski planned to use from a prior examination. However, Mr. Zapp made clear in the October 1998 corrective action that Mr. Niedzielski was not meeting his supervisor's expectation concerning the development of the examination. Due to Mr. Niedzielski's lack of performance, Mr. Zapp believed he would have to place unnecessary burdens on other employees in order to complete the examination on time. In the corrective action, Mr. Zapp clearly set out the performance basis for his warning and advised Mr. Niedzielski on how to improve his performance. While I agree with Mr. Niedzielski that Mr. Zapp bore some responsibility for the mis- communications during 1998, I also find Mr. Zapp's assessment of Mr. Niedzielski's preparation of the examination through the end of September reasonable. At the start of 1998, Mr. Niedzielski was given responsibility for all three portions of the examination. However, by the end of September 1998, other than the submission of an exam development schedule and two outlines, Mr. Niedzielski had done very little in actually writing examination questions, preparing simulator scenarios, or developing the operations walk-through. In light of Mr. Niedzielski's work through September 1998, Mr. Zapp had a firm foundation for his critique of Mr. Niedzielski's efforts. Clearly, Mr. Zapp's motive for presenting the corrective action was performance-based.

[Page 38]

The March 3, 1999 performance report contains downgraded ratings and observations relating to Mr. Niedzielski's program administration and communication (CX 8). These performance comments are consistent with Mr. Zapp's earlier observations in the corrective action document. I find this continuity of performance evaluation between the October 1998 corrective action and the March 1999 performance report very important. Even though Mr. Zapp presented the performance evaluation after Mr. Niedzielski's January 1999 nuclear safety complaint, the connection between the evaluation comments in the corrective action and the performance report is clear and convincing evidence that Mr. Zapp was not responding to the January 1999 complaint when he authored the March 1999 performance report.²⁰ Rather, the performance report reflects the assessments he developed in October 1998 and shared with Mr. Niedzielski at that time. Mr. Zapp's ratings for Mr. Niedzielski, including the overall rating of 4, are also consistent with the evaluation criteria in the BG&E rating instructions (CX 4). According to these guidelines, a top rating of 5 requires the employee to "consistently" achieve the desired proficiency. Mr. Zapp's rating of 4 on the performance report reasonably reflects that Mr.

Niedzielski's performance throughout the rating period of 1998, as specifically documented in the October 1998 corrective action, was not consistent.

Also, I found Mr. Zapp to be a sincere witness. His testimony concerning the basis for the performance ratings and comments was credible. In addition, to my determination that Mr. Zapp was a credible witness, his behavior in January 1999 in encouraging Mr. Niedzielski to pursue his nuclear safety concern through appropriate channels is consistent with his denial of a retaliatory motive.

I find the respondent has met its burden of production by presenting clear and convincing evidence that Mr. Zapp based his March 1999 performance report on legitimate performance factors. Likewise, since the 5% pay reduction was based on a legitimate employee appraisal, a legitimate motive also serves as the basis for that adverse personnel action. Having considered the entire record, I also conclude that Mr. Niedzielski is unable to carry his ultimate burden of proof by establishing that Mr. Zapp's stated reasons for his personnel actions were pretextual and his true motive was discriminatory retaliatory for Mr. Niedzielski's January 1999 nuclear safety complaint.

Issue # 3 - Pay Level Downgrade

Nearly contemporaneous with Mr. Niedzielski's March 1999 nuclear safety complaint and the performance report for 1998, Ms. Winters downgraded Mr. Niedzielski's pay level from level 79 to 78. Due to the proximity of this personnel action to the complaints and the potential adverse effect on salary,²¹ I find that Mr. Niedzielski has established a *prima facie* case that his reports of a nuclear safety concern contributed to the decision to reduce his pay level.

[Page 39]

Even though a *prima facie* case has been established, the respondent, through Ms. Winters' testimony, has provided clear and convincing evidence that the resulting pay level decrease was not related to Mr. Niedzielski's nuclear safety concern. When Mr. Niedzielski first raised his nuclear safety concern with Ms. Winters, she was not upset by the complaint. Although she disagreed with Mr. Niedzielski's conclusion that his assertion of ineffective resources involved nuclear safety, Ms. Winters still encouraged Mr. Niedzielski to pursue his complaint through the appropriate channels. Concerning the reduction in Mr. Niedzielski's pay level, Ms. Winter articulated legitimate management reasons for raising the pay level of senior operators to level 79 to encourage their transfers to the training unit. She then provided a rational explanation for why Mr. Niedzielski, whose prime responsibility no longer involved plant operations, should not have been included in the pay level raise. Since I consider Ms. Winters a credible witness, I also believe her denial of any retaliatory motive related to Mr. Niedzielski's complaints. Accordingly, the respondent has rebutted Mr. Niedzielski's *prima facie* case of discrimination.

Since Ms. Winters' explanations successfully rebutted Mr. Niedzielski's *prima facie* case, he then had to establish that her presentation was just pretext. In considering the entire record, I conclude Mr. Niedzielski did not successfully impeach the respondent's explanation of a legitimate reason for the change in his pay level from 79 to 78. As a result, Mr. Niedzielski has failed to carry his ultimate burden of proving that the pay level reduction was a discriminatory act in response to his concern about nuclear safety.

CONCLUSION

Mr. Niedzielski has failed to establish a *prima facie* case of unlawful discrimination because his complaints about ineffective and insufficient resources for the development of the January 1999 NRC examination were not reasonably related to nuclear safety, and correspondingly, not protected activities. Even if his two complaints were found to be protected activities, Mr. Niedzielski failed to carry his ultimate burden of persuasion. The respondent has presented clear and convincing evidence of legitimate reasons for both the March 1999 performance appraisal and salary reduction and the April 1999 pay level reduction.

RECOMMENDED ORDER

The complaint by Mr. ROBERT E. NIEDZIELSKI of discrimination under Section 211 of the Energy Reorganization Act of 1974, 42 U.S.C. §5851, as amended, is **DISMISSED**.

SO ORDERED:

RICHARD T. STANSELL-GAMM
Administrative Law Judge

Washington, D.C.

NOTICE OF REVIEW: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §§ 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

¹The following notations appear in this decision to identify specific evidence: CX - Complainant exhibit; RX - Respondent exhibit; ALJ - administrative law judge exhibit; and, TR - Transcript of hearing.

²TR, pages 22 to 24 and 568 to 572.

³TR pages 24 to 34 and 572 to 600.

⁴This documents contains only the following pages: C-10, C-11, C-13, C-14, C-17, C-18, C-22 to C-26.

⁵The actual 100 question operator examination is included as attachment.

⁶Mr. Evans was also called as a witness for the respondent (TR, page 263).

⁷Since the timeliness of the complaint is considered a statute of limitations issue, failure to raise the issue at the hearing amounts to a waiver to the affirmative defense. *See Hobby v. Georgia Power Co.*, 90-ERA-30 (Sec'y Aug 4, 1995). The respondent did not raise the timeliness issue at the February 2000 hearing. As a result, regardless of my findings, the timeliness issue has been waived.

⁸Mr. Zapp indicated Mr. Niedzielski may have first raised a nuclear safety concern in regards to exam development resources in December 1998. However, Mr. Niedzielski admitted that he did not discuss his nuclear safety concern with his supervisors until January 1999.

⁹The participants in this conversation have different recollection of its contents and whether Ms. Winters threatened Mr. Niedzielski. Since I found the testimony of both Mr. Niedzielski and Ms. Winters credible, I conclude Mr. Niedzielski gave more meaning to Ms. Winters' statement about a new job than she actually intended.

¹⁰I recognize the Administrative Review Board's position that in a fully litigated case in which the respondent presents evidence of a legitimate motive for the personnel action the analysis of a *prima facie* case serves no analytical purpose because the final decision will rest on the complainant's ultimate burden of proof. *See Adjiri v. Emory University*, 97-ERA-36 (ARB July 14, 1998) and *Carter v. Electrical District No. 2 of Pinal*, 92-TSC-11 (Sec'y Jul. 26, 1995). However, despite some duplication of effort, I find that working through the *prima facie* elements useful since the ultimate burden of proof still involves many of the elements covered in the *prima facie* analysis. In addition, if the complainant, even in a fully litigated hearing, fails to establish an element of the *prima facie* case, evaluating whether an ultimate burden of proof is met may not serve any purpose.

¹¹The citation for *Couty* is *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989).

¹²According to the Secretary, an internal complaint should be a protected activity because the employee has taken his or her environmental concern first to the employer to permit a chance for the violation to be corrected without government intervention. *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec'y Apr. 27, 1987)(order of remand).

¹³For example, in his long response to Mr. Zapp's corrective action in October 1998, Mr. Niedzielski did not mention any nuclear safety concern (RX 7).

¹⁴The NRC required BG&E to correct three questions on its January 1999 examination submission (RX 6).

¹⁵Mr. Niedzielski's counsel also attempted to elicit from Mr. Phifer support for the theory that an insufficiently prepared exam could result in incompetent operators being licensed, jeopardizing both public and BG&E safety. However, Mr. Phifer, the safety specialist for the company, did not agree and pointed out that NRC had to approve the exam.

¹⁶In a review of the reasons several applicants failed the November 1997 NRC examination, the failure of the contractor to meet both quality and timeliness expectations was listed as a contributing factor (CX 15). However, absent further explanation, I do not consider the study a sufficient basis to conclude that the November 1997 examination as finally approved by the NRC was of poor quality. In other words, the study does not explain how the lack of quality of the contractor's work or the contractor's tardiness led to applicants failing the exam.

¹⁷Even though my finding that Mr. Niedzielski did not engage in a protected activity precludes the establishment of a *prima facie* case, I will proceed to the next two issues for the benefit of both parties.

¹⁸See *Vanadore v. Oak Ridge National Laboratory*, 92-CAA-2 and 5, 93-CAA-1, and 94-CAA-2 and 3, slip op. at 32 (ARB June 14, 1996) citing *Bassett v. Niagara Mohawk Power Corp.*, 85-ERA-34, slip op. at 4 (Sec'y Sept. 28, 1993).

¹⁹See *Conway v. Valvoline Instant Oil Change, Inc.*, 91-SWD-4 (Sec'y Jan 5, 1993).

²⁰I note Mr. Zapp had completed the March 1999 performance report prior to Mr. Niedzielski's submission of the formal nuclear safety complaint on March 19, 1999.

²¹Due to a company policy, Mr. Niedzielski's actual pay was not affected by the pay level downgrading. However, for the sake of this analysis, I will assume that the downgrading does have a future practical effect of reducing his pay if he achieves an overall rating of 5 on future performance appraisals or the dollar amounts associated with the pay levels are raised.